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Supreme Court, U.S.
FILED

071368 APR 29 2008

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No. (1)

IN THE

SUPREME COURT OF THE UNITED STATES

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DAVID PARKER; TONIA PARKER; JOSHUA PARKER; JACOB PARKER; JOSEPH ROBERT WIRTHLIN; ROBIN WIRTHLIN; JOSEPH ROBERT WIRTHLIN, JR.,

Petitioners

v.

WILLIAM HURLEY; PAUL B. ASH; HELEN LUTTON; THOMAS R. DIAZ; OLGA GUTTAG; SCOTT BURSON; ANDRE RAVENELLE; JONI JAY; JENNIFER WOLFRUM; HEATHER KRAMER; TOWN OF LEXINGTON; THOMAS GRIFFITH,

Respondents

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I. WHETHER OBJECTING PARENTS HAVE A CONSTITUTIONAL RIGHT TO OPT THEIR PUBLIC SCHOOL CHILDREN OUT OF, OR EVEN TO RECEIVE NOTICE OF, UNDISPUTED GOVERNMENT EFFORTS TO INDOCTRINATE KINDERGARTEN, FIRST AND SECOND GRADE SCHOOL CHILDREN INTO THE PROPRIETY, INDEED DESIRABILITY, OF SAME GENDER MARRIAGE?

II. WHETHER A PUBLIC SCHOOL'S OPEN AND SPECIFIC INTENTION TO INDOCTRINATE KINDERGARTEN THROUGH SECOND GRADE CHILDREN INTO DISBELIEVING CORE TENETS OF THEIR FAMILIES' DEEPLY HELD RELIGIOUS FAITH CONSTITUTES A BURDEN ON THE FAMILIES' FREE EXERCISE OF RELIGION?

III. WHETHER THE "HYBRID RIGHTS" DOCTRINE ENUNCIATED IN EMPLOYMENT DIV. V. SMITH, 494 U.S. 872 (1990) PROVIDES A CLAIM FOR FAMILIES WHO WISH TO PROTECT THE RELIGIOUS BELIEFS OF VERY YOUNG CHILDREN FROM MORAL INDOCTRINATION BY PUBLIC SCHOOL TEACHERS CONCERNING THE DEFINITION OF MARRIAGE?

## PARTIES TO PROCEEDING

The Petitioners are two sets of families: the Parkers-- David Parker and Tonia Parker, and their two young children Jacob Parker and Joshua Parker, and the Wirthlins-- Joseph Robert Wirthlin and Robin Wirthlin, and their young child, Joseph Robert Wirthlin, Jr. The Petitioners will be referred to collectively as "Plaintiffs" and "Petitioners."

The Respondents are the Town of Lexington, Massachusetts; Paul Ash, the Lexington School Superintendent; William Hurley, Helen Lutton, Thomas R. Diaz, Olga Guttag, Scott Burson, Andre Ravenelle, Joni Jay, Jennifer Wolfrum, Heather Kramer, and Thomas Griffith. The Respondents will be referred to individually by name, as the "school district," the "Town of Lexington," or collectively as "Defendants" and "Respondents."

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## OPINIONS BELOW

An opinion of the First Circuit Court of Appeals was filed on January 31, 2008. Parker v. Hurley, 514 F.3d 87, 229 Ed. Law.Rep. 328 (1st Cir. 2008).

The case was originally heard by the District Court for the District of Massachusetts. (Wolf, J.) The District Court issued its Ruling and Order on February 23, 2007. Parker v. Hurley, 474 F. Supp. 2d 261, 218 Ed. Law Rep. 187 (D. Mass. 2007).

## STATEMENT OF JURISDICTION

The original judgment of the First Circuit Court of Appeals was entered on January 31, 2008. The Court has jurisdiction to review the Judgment of the Court of Appeals pursuant to 28 U.S.C. §1254 (1).

## CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

The plaintiff petitioners are two separate families, the Parkers and Wirthlins. The Parkers have two young children—Jacob and Joshua, and the Wirthlins have one young child, Joseph ("Joey").

On March 24, 2006, the plaintiff Joey Wirthlin was a child in the second grade. On that date, one of the defendants forced him to listen to a reading of a book entitled King and King, by Linda de Haan and Stern Nijland. This reading was ". . . precisely *intended* to influence the listening children toward tolerance of gay marriage. That was the point of why that book was chosen and used." (App. A37) (Emphasis in original.)

The book describes a romantic attraction between two men. The protagonist is a male prince who searches for a spouse. Several princesses are presented for him to choose from.

He rejects them all for superficial reasons, such as the fact that one princess's arms are too long. He discovers he is homosexual, falls in love, and lives happily ever after with another homosexual male. The two males are depicted as kissing at the end of the book. The book could be objectively and fairly viewed as presenting the homosexual choice as the "better" or "best" choice. (App. D)

Both plaintiff families practice a Judeo-Christian faith that holds that a marriage is, by definition, a holy union between a man and a woman. They believe, as a matter of the deepest faith, that other forms of "marriage" are antithetical to God's purpose for this sacred covenant. They believe, as a matter of the deepest faith, that homosexual conduct and any kind of transgender conduct is immoral. (App. C9-10)

The reading of King and King was part of a larger concerted effort; "a specific intention to denigrate the [families'] sincere and deeply-held faith."[1] The Wirthlins and the Parkers are devout Judeo-Christians. Included in their core Judeo-Christian beliefs is the concept that issues pertaining to sexual intimacy, procreation,

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[1] The complaint alleges that "the purpose of adopting these suggestions is the specific intention to indoctrinate young children into the concept that homosexuality and marriage between same-sex partners is moral and accepted, and that those who hold a faith such as the Parkers are incorrect in their beliefs. Essentially, the defendants are requiring the minor plaintiffs to affirm a belief inconsistent with and prohibited by their religion. Such indoctrination is inconsistent with the Parkers' sincere and deeply held religious faith." (App. C12)

human sexuality, and the holy basis of matrimony should remain private within families, be introduced by parents, and governed by the laws of the God of Abraham. Also included is the concept that homosexual behavior is immoral in that it violates God's law. (App. C8)

In September 2004, five-year-old Jacob Parker began attending kindergarten classes at Estabrook Elementary School Almost immediately thereafter, the defendants commenced an intentional campaign to teach the Parkers' very young child that the family's religious faith was incorrect. (App. C8-12)

On January 14, 2005, Jacob brought home a "Diversity Book Bag." The bag contained a book titled, Who's in a Family by Robert Skutch. Upon reviewing the book, the Parkers realized that the book appeared to depict homosexual couples with children. The Parkers had received no notice that these materials would be sent home at that time. The next school year, Jacob entered the first grade. First graders had a "reading center" in the classroom that served as a mini-library. The same book, Who's in a Family, was in Jacob's reading center along with an additional book, Molly's Family by Nancy Garden, depicting gay and lesbian relationships and gay and lesbian marriage. These books were available to Jacob without parental notification. There was no method by which the Parkers could exercise an opt-out option.

The Parkers did not wish to discuss the topic of homosexual marriage, homosexuality or transgenderism with Jacob or Joshua at their current ages. The school responded by openly

refusing to treat the matter as one that would require notice and the principal stated that this was not a parental notification issue. (App. C12)

On February 8, 2005, the Parkers attended a School Anti-Bias Committee meeting featuring Jon Pfeifer, a Gay Lesbian Straight Education Network (GLSEN) representative. The meeting's subject was titled "How and Why to Talk to Your Children about Diversity." The meeting focused exclusively upon homosexuality and how to acclimate young children to it. Mr. Pfeifer encouraged the School Committee to place many homosexual family books in each classroom, hang gay and lesbian family posters in each classroom, and encourage teacher-initiated discussions in each class. Mr. Pfeifer's response to one parent's comment that kids learn negative jargon at a young age was "kids learn easier . . . go through year after year and it'll be better." Several teachers and the Principal of the Estabrook Elementary School attended the meeting, and visibly and verbally affirmed this action plan. (App. C11)

The catalyst for the litigation is the defendants' refusal to even consider the plaintiffs' reasonable notice and "opt out" requests. (App. C-12, 26)

On April 27, 2006 the families jointly filed a four (4) count complaint asserting that the Town of Lexington, Massachusetts, an elementary school principal, a school teacher, and other educational administrators had violated their fundamental constitutional rights to direct the education and moral upbringing of their children, to the free exercise of religion, and to family

privacy. The complaint alleged that the defendants harbored a specific intention to indoctrinate young children into the concept that homosexuality and marriage between same-sex partners is moral and accepted, and that those who hold a faith such as the plaintiffs are incorrect in their beliefs. The complaint alleged further that the defendants required the minor plaintiffs to affirm a belief inconsistent with and prohibited by their religion. (App. C1-34)

The defendants moved to dismiss per Rule 12(b)(6).[2]

On February 23, 2007, the district court issued a thirty-seven (37) page decision dismissing the federal claims on the merits.[3] It incorrectly held that the plaintiffs' claims were barred by the First Circuit holding in Brown v. Hot, Sexy & Safer Productions, 68 F.3d 525 (1st Cir. 1995). (App. B)

The plaintiffs appealed to the First Circuit Court of Appeals. Acknowledging the difficult constitutional questions presented, the First Circuit upheld the dismissal on different grounds, primarily asserting that the plaintiffs failed to allege a "free exercise" burden. (App. A39).

The First Circuit cited no Supreme Court authority for its core holding, relying instead on Mozert v. Hawkins County Bd. of Education, 827 F.2d 1058 (6th Cir. 1987).

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[2] By agreement of the parties the court expanded the record slightly to include some of the books that the plaintiffs found offensive. (App. A4)

[3] Massachusetts state law claims were also correlatively dismissed.

## REASONS FOR GRANTING THE PETITION

### I. THE COURT SHOULD RESOLVE A SPLIT AMONG THE CIRCUITS OVER WHETHER FAMILIES OF ELEMENTARY AGE PUBLIC SCHOOL CHILDREN LEAVE THEIR "MEYER/PIERCE" RIGHTS AT THE SCHOOL HOUSE DOOR.

> If parents have absolutely no say in what their children may be taught, they are left with 'the most vulgar of ultimatums - either your child can receive a public education or she can continue to faithfully practice her religion, but not both.' Michael E. Lechliter, The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children, 103 Mich. L. Rev. 2209, 2236 (2005).

Parents have a fundamental right to direct the moral upbringing of their children. Troxel v. Granville, 530 U.S. 57, 65 (2000) (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)) (other citations omitted). Whether and to what extent such rights may be asserted in the public schools is a difficult question. At least one circuit, the Ninth, simply refuses to recognize that such rights can be asserted in the context of public schools. See, Fields v. Palmdale, 427 F.3d 1197 (9th Cir. 2005), amended by and re-aff'd, 477 F.3d 1187 (9th Cir.

2006). At least one circuit, the Third, expressly disagrees.

In C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 185 (3d Cir. 2005), the Third Circuit upheld a school district's use of a survey concerning sexual behaviors of middle and high school children finding no constitutional violation. However, the Third Circuit went out of its way to distinguish its decision from the Ninth Circuit's erroneous views stated in Fields.

The C.N. court wrote:

> In reaching this conclusion, we do **not** hold . . . that the right of parents under the Meyer-Pierce rubric 'does not extend beyond the threshold of the school door.' Nor do we endorse the categorical approach to this right taken by the Fields court, wherein it appears that a claim grounded in Meyers-Pierce will now trigger only an inquiry into whether or not the parent chose to send their child to public school and if so, then the claim will fail.

C.N., 430 F.3d at 185 n.26 (citing Fields, 427 F.3d at 1207) (Emphasis supplied.)[4]

This court should resolve the split by accepting this case and ruling that the Third Circuit's view is correct.

Those who see little or no role for the courts express hope that parental concerns may be

[4] At least implicitly, the Third Circuit was recognizing the "vulgar ultimatum" that Professor Lechliter succinctly described, as quoted on page 7 above.

appropriately addressed in the political arena. Indeed, in its conclusion here, the First Circuit suggested that the plaintiffs avail themselves of the political process. (App. A34) No doubt, political accommodation is preferable to litigation whenever possible. But the reality is that, at least in Lexington, Massachusetts, the petitioners represent a tiny minority comprised of people who harbor deep and abiding religious beliefs consistent with the "Defense of Marriage Act." 1 U.S.C. §7; 28 U.S.C. §1738C. The whole purpose of civil rights litigation is to protect minorities from the government overreaching the defendants exhibited. See 18 U.S.C. §1983.

This Court has long recognized a basic constitutional right of parents to direct the upbringing of their children. See generally, Troxel v. Granville, 530 U.S. 57 (2000). It has also recognized that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)). "...(S)tudents do not shed their first amendment rights at the schoolhouse gate." Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007) (citing Tinker v. Des Moines Independent Community School Dist. 393 U.S. 503, 506 (1969)). See also, West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (Fourteenth Amendment claims reach boards of education.)

Since 1923, if not before, the Supreme Court has recognized that parents possess a fundamental liberty interest to be free from unnecessary governmental intrusion in the

rearing of their children. See Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1972); Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923). In the seminal Pierce decision, the Supreme Court held that the state could not pass a law requiring that all students attend public school. The Court's words from 1925 perhaps remain the most vital formulation of plaintiffs' position here: ". . . [a] child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Pierce, 268 U.S. at 535.

Use of the phrase "high duty" reflects a recognition that the genesis of the parental right is religious and of long standing. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and the upbringing of their children." Yoder, 406 U.S. at 232; see Ginsberg v. New York, 390 U.S. 629, 639 (1968).

In 1972, the Supreme Court ruled that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. Aspects of child rearing protected from unnecessary intrusion by the government include the inculcation of moral standards, religious beliefs, and elements of good citizenship." Yoder, 406 U.S. at 232-33; see Meyer, 262 U.S. at 401; Pierce, 268 U.S. at 534-35.

Petitioners recognize that the rights of students "must be 'applied in light of the special characteristics of the school environment.'" Morse, 127 S.Ct. at 2622 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) Even so, the state's interest in public education "is not totally free from a balancing process when it impinges on fundamental rights and interests, such as . . . the traditional interest of parents with respect to the religious upbringing of their children . . . ." Yoder, 406 U.S. at 213-214.

In light of these competing concerns, petitioners carefully tailored their requested relief. They did not direct their challenge at the curriculum itself, as the First Circuit correctly recognized:

> Plaintiffs . . . are not attempting to control the school's power to prescribe a curriculum. The plaintiffs accept that the school system "has a legitimate secular interest in seeking to eradicate bias against same-gender couples and to ensure the safety of all public school students." They assert that they have an equally sincere interest in the accommodation of their own religious beliefs and of the diversity represented by their contrary views. Plaintiffs specifically disclaim any intent to seek control of the school's curriculum or to impose their will on others. They do not seek to change the choice of books available to others but only to require notice of the books and an exemption, and even then only up to the seventh grade. (App. A29)

The First Circuit nonetheless refused to provide any recognition to plaintiffs' claims. It went on to state: "Nonetheless, **we have found no federal case under the Due Process Clause which has permitted parents to demand an exemption for their children from exposure to certain books used in public schools.**" (App. A29). (Emphasis supplied.)

This language is precisely the reason to accept certiorari. The absence of any express authority allowed the First Circuit to ignore decades of constitutional jurisprudence dating back to Meyer and Pierce.

Moreover, this formulation misstates the issue. Petitioners have not complained about "mere exposure." Their concern is about "systematic indoctrination" of children too young to recognize that the materials to which they are subjected can be criticized. (App. A10).

Although there is no identical case, it should be clear that the First and Fourteenth Amendment guarantee parents the right to exclude children from having their true and deepest faith indoctrinated out from under them. The state can not compel families to govern their intimate lives in accord with a government-created ideal. Hodgson v. Minnesota, 497 U.S. 417, 452 (1990) (plurality opinion) (citing Meyer, 262 U.S. at 399-400). Public school students are particularly vulnerable to the inculcation of orthodoxy in the guise of pedagogy. Cole v. Maine Sch. Admin. Dist. One, 350 F. Supp. 2d 143, 150 (D. Me. 2004.)

Petitioners respectfully assert that if the fundamental parental right has any true meaning, it is to preclude a public school from egregiously usurping the parental role in religious and moral matters of the utmost importance. It is not educators, but parents who have primary rights in the upbringing of children. Gruenke v. Seip, 225 F.3d 290, 307 (3d Cir. 2000).

Although successful cases may be rare, this Court should follow the Third Circuit and accept the case to make clear that families do not categorically leave their fundamental rights at the school house door.

### A. The First Circuit Failed to Construe the Complaint in the Light Most Favorable to Plaintiffs

To justify its holding, the First Circuit engaged in unfair fact finding. On the one hand, the court recognized that an intent to "systematically indoctrinat[e]" was pled. (App. A-9). Yet the court ruled as a matter of law there was no evidence of indoctrination. (App. A32).

This was plain error. Fed.R.Civ.P. Rule 8 allows notice pleadings.[5] The plaintiffs supported their general allegation with specific facts, including that the school committee acted on behalf of a special interest group intent in asserting its private views:

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[5] Petitioners recognize that in Bell Atl. Corp. v. Trombly, 127 S. Ct. 1955, 1965-1969 (2007), the Supreme Court "retired" Conley v. Gibson, 355 U.S. 41 (1957). Even so, the complaint is sufficient to state the claim.

On February 8, 2005, the [Parkers] attended a meeting featuring Jon Pfeifer, a Gay Lesbian Straight Education Network (GLSEN) representative. The meeting's subject was titled "How and Why to Talk to Your Children about Diversity." In fact, the meeting focused exclusively upon homosexuality and how to acclimate young children to it. Mr. Pfeifer encouraged the Committee to place many homosexual family books in each classroom, hang gay and lesbian family posters in each classroom, and encourage teacher-initiated discussions in each class. Mr. Pfeifer's response to one parent's comment that kids learn negative jargon at a young age was "kids learn easier . . . go through year after year and it'll be better." Several teachers and the Principal of the Estabrook Elementary School attended the meeting, and visibly and verbally affirmed this action plan. On information and belief, the Town, School Committee, Ms. Jay, Mr. Hurley, and Dr. Ash have adopted Mr. Pfeifer's suggestions. On information and belief, the purpose of adopting these suggestions is the specific intention to indoctrinate young children into the concept that homosexuality and marriage between same-sex partners is moral and accepted, and that those who hold a faith such as the Parkers are incorrect in their beliefs. (App. C11-12)

These facts are ignored in the First Circuit's opinion.

The plaintiffs have alleged that they were acting in accord with the "high duty" this court long ago treated as virtually sacrosanct. Pierce, 268 U.S. at 535. Nothing has been shown that would require this duty to be extinguished.

Plaintiffs should be allowed to prove their case. The defendants were on notice that the claim was one of "indoctrination." It was pled with specificity. The First Circuit did not have the power to assert that there was no indoctrination as a matter of fact.

For all of the above reasons, certiorari should be granted so that this Court may re-affirm the "Meyer/Pierce" tradition and hold that in rare cases, a claim may extend beyond the threshold of the school house door.

## II. THIS COURT HAS NEVER DECIDED WHETHER INDOCTRINATION INTENDED TO ERADICATE FAITH CAN CREATE A "FREE EXERCISE" BURDEN.

As demonstrated above, "systematic indoctrination" was pled. The First Circuit could not ignore that reality. It wrote:

> The heart of the plaintiffs' free exercise claim is a claim of "indoctrination": that the state has put pressure on their children to endorse an affirmative view of gay marriage and has thus undercut the parents' efforts to inculcate their children with their own opposing religious views.

> The Supreme Court, we believe, has never utilized an indoctrination test under the Free Exercise Clause, much less in the public school context. The closest it has come is Barnette, a free speech case that implicated free exercise interests and which Smith included in its hybrid case discussion. (App. A35-36)

Despite its clear enunciation of the issue, the First Circuit blatantly refused to decide it. It stated "We do not address whether or not an indoctrination theory under the Free Exercise Clause is sound." (App. A36)[1]

Certiorari should therefore be granted so that this important and properly framed question is answered. Simple logic, as well as the tapestry of this Court's earlier authority, compels the conclusion that open and notorious attempts to teach tiny children that their families' faith is wrong creates an enormous burden on the faith that can never be overcome. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to

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[1] To complete its circumvention of the issue, the First Circuit wrote that "Plaintiffs' pleadings do not establish a viable case of indoctrination, even assuming that extreme indoctrination can be a form of coercion." (App. A36). This blatant refusal to follow Rule 12(b)6 is discussed in section I, supra.

confess by word or act their faith therein." Barnette, 319 U.S. at 642.

In 1986, this Court stated that "[P]ublic education must prepare pupils for citizenship in the Republic . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting C. Beard & M. Beard, New Basic History of the United States 228 (1968). Unfortunately, some educators view this language as authorizing an unfettered right to impose their ideologies upon students. At times these efforts violate the establishment clause. E.g., Edwards v. Aguillard, 482 U.S. 578 (1987) (Louisiana Creationism Act).

However, this Court has **never** decided when such pedagogical efforts can become a constitutionally significant burden upon the "free exercise" of religion. The Court should therefore grant certiorari and rule that when such pedagogical efforts intentionally and openly seek to eradicate parents' rights in areas that the court has previously recognized to be the most intimate and private, an actionable free exercise burden has been created. This is especially so where the intentional indoctrination efforts also intrude upon the parents' due process rights to direct the moral upbringing of their children. (See section I, supra.)

The issue is particularly ripe in this case because of the egregious level of defendants' misconduct, in engaging in intentional and systematic indoctrination. Well aware of

petitioners' faith, the defendants nonetheless chose to indoctrinate very young children into the concept that homosexual behavior is right and good. Lest this seem overstated, the First Circuit acknowledged the point even while ruling against the petitioners. "It is a fair inference that the reading of *King and King* was precisely *intended* to influence the listening children toward tolerance of gay marriage. That was the point of why that book was chosen and used." (App. A37) (Emphasis in original)

But this case is about more than tolerance. Adults can learn to recognize and tolerate differences between people. The defendants' intention here **is to eradicate** any differences of opinion. This is evident from the ages of the children, the books themselves, and the defendants' refusal to even consider giving notice to the parents. And this allegation was well pled from the beginning.[6] If not to indoctrinate, why would the school refuse to even notify the parents that these matters were being discussed in second grade? Clearly, the defendants are motivated by a political determination that the plaintiffs' faith is morally incorrect, and that eradication of their beliefs is a civic virtue. Moreover, the complaint alleges that this activity is part of a larger effort

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[6] That this was "well pled" cannot be contested. The First Circuit itself stated "The complaint alleges that the public schools are systematically indoctrinating the Parkers' and the Wirthlins' young children contrary to the parents' religious beliefs and that the defendants held "a specific intention to denigrate the [families'] sincere and deeply-held faith." (App. A10-11)

at indoctrination resulting from the interplay between the local school system and political lobbying groups. This too is alleged with clarity. (App. C11-12, C26)

> On information and belief, the reason why the defendants will not inform the Wirthlins is that the defendants' specific intention is to coercively indoctrinate the children into moral belief systems that are markedly different from those of their parents, and the defendants harbor a specific intention to denigrate the Wirthlins' sincere and deeply-held faith. The Wirthlins wish to direct the personal moral and religious views of their own children and believe these children are too young, at ages seven and eight to be able to comprehend the complexities of such a controversial and advanced topic. (App. C26)

"[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." Wooley v. Maynard, 430 U.S. 705, 716 (1977). This is especially true where the effort to disseminate an ideology is targeted at children far too young to evaluate the merits of such ideology for themselves.

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the

> classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.

Edwards, 482 U.S. at 584 (1987); accord, Hansen v. Ann Arbor Pub. Sch., 293 F. Supp. 2d 780 (E.D. Mich. 2003). There is nothing voluntary about a five-, six- or seven-year-old attending the early grades of elementary school. "[T]he State exerts great authority and **coercive power** through mandatory attendance requirements, **and** because of students' emulation of teachers as role models and the children's susceptibility to peer pressure." Edwards, 482 U.S. at 584 (Emphasis supplied.)

In Lee v. Weisman, 505 U.S. 577, 592 (1992), this court recognized heightened concerns of "subtle coercive pressure in the elementary public schools." Additionally, in Lemon v. Kurtzman, 403 U.S. 602, 619 (1971), this court held that "[w]hat would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion."

The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The clause "forbids subtle departures from neutrality," Gillette v. United States, 401 U.S. 437, 452 (1971), and "covert suppression of particular religious beliefs," Bowen v. Roy, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.). Official action that targets religious conduct for distinctive treatment cannot

be shielded by mere compliance with the appearance of facial neutrality. The Free Exercise Clause protects against governmental hostility that is masked as well as overt. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1999).

Absent guidance from this Court to define a free exercise burden, the First Circuit adopted language from Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (5th Cir. 1987). (App. A34-35)

Mozert upholds a school committee's book curriculum choice over objections from "Born Again Christians" (Court's phrase) that the schools' books burdened their faith. The First Circuit quoted Mozert to the effect that "the evil prohibited by the Free Exercise Clause" is "governmental compulsion either to do or refrain from doing an act forbidden or required by one's religion, or to affirm or disavow a belief forbidden or required by one's religion. (App. A35)

This, indeed is precisely what the plaintiff-petitioners pled in their complaint. (App. C10, 12)

In Mozert, the court ruled that the plaintiffs failed to prove their case after a trial on the merits. Here, the court refused to allow the plaintiffs an opportunity to try their case, or even to take discovery. The court confused the failure of plaintiff's proof in Mozert with a legal enunciation of burden. Indeed, in what might be the legal equivalent of a Freudian slip, the First Circuit stated "There is no **evidence** of systemic indoctrination," apparently forgetting that the plaintiffs had properly pled exactly that, and had yet to have been afforded an opportunity to

present any evidence whatsoever. (App. A37) (Emphasis supplied.)

This Court should accept the case and rule that, in the narrow areas of intimate family behavior, a free exercise burden is created where public school educators attempt to systematically indoctrinate young children into disbelieving core tents of their families' faith.

A grant of certiorari and a reversal would not open a floodgate of parental litigation against public schools. The parents here have never challenged curriculum and the Court is not being asked to decide whether a parent may do so.[7] Rather, the parents seek only to exclude children from indoctrination concerning aspects of intimate family and sexual behavior that the court historically protects as private. At least since Griswold v. Connecticut, 381 U.S. 479 (1965), this Court has recognized a privacy right with respect to intimate family matters. E.g., Lawrence v. Texas, 539 U.S. 558 (2003). This Court recognizes spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Id. at 562. In these same private spheres, the public schools cannot usurp the parental role.

In Wisconsin v. Yoder, 406 U.S. 205, 233 (1972), the Court held that parents have the right and duty to inculcate in their children "moral standards, religious beliefs, and elements of good citizenship," and that the Amish plaintiffs had

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[7] Curriculum challenges based upon the "establishment clause" are routine. E.g., Edwards v. Aguillard, 482 U.S. 578 (1987)

demonstrated that the State's educational requirements posed a hazard to the free exercise of their religious beliefs. Id. at 218.

Unlike the Amish plaintiffs in Yoder, the plaintiffs here do not live in a largely separate culture. The First Circuit gave great weight to this distinction essentially ruling that Yoder was sui generis. This thinking is misplaced.

Certiorari should be granted to allow this Court to reiterate Yoder's vitality in a world post-Employment Div. v. Smith, 494 U.S. 872 (1990). Here, the parents have chosen public school and are willing to accept the obligations of citizenship in a diverse community. The alternative choice, to send a child to private school, does not come without a price. Apart from the economic burden, such choices can create an unnecessary insularity. The interesting dynamic in this case is that the petitioners, a small minority in Lexington, Massachusetts, wish to remain part of the fabric of the public school. They ask only that they, as a family unit, not be placed at risk of losing their religion by co-ordinated State efforts to indoctrinate their children. The right to assert an alleged "free exercise" violation should not depend upon the demographics of the practitioners of the religion, or the degree to which the religion may be perceived as demanding upon its adherents. The Constitution should not favor one religion over another in determining the strength of the free exercise right.

Nor is this a case where the local authorities can credibly claim to be concerned with public health. Courts have routinely allowed local

authorities broad latitude in designing "school programs that educate children in sexuality and health." Fields, 427 F.3d at 1205 (citing Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003) (upholding school district's mandatory health classes against a father's claim of a violation of his fundamental rights); Parents United for Better Sch., Inc. v. Sch. Dist. of Philadelphia Bd. of Educ., 148 F.3d 260 (3d Cir. 1998) (upholding school district's consensual condom distribution program); Brown, 68 F.3d 525 (upholding compulsory high school sex education assembly program); Citizens for Parental Rights v. San Mateo County Bd. of Educ., 124 Cal. Rptr. 68 (1975)) (parenthetical descriptions as stated in Fields).

The analysis here is different. Unlike cases in which a school attempts to instill knowledge regarding health issues or consequences of sexual activity, here there is no immediate reason for broaching the topic of sexuality at all. Plaintiffs have alleged that the intent is to indoctrinate a religious ideology for the simple reason that the State believes it is preferable to the plaintiffs' deeply held core belief.

The plaintiffs should be allowed to prove their case.

## III. THIS QUINTESSENTIAL "HYBRID RIGHTS" CASE PRESENTS THE COURT A MUCH NEEDED OPPORTUNITY TO EXPLAIN THE DOCTRINE AND RESOLVE A SPLIT AMONG CIRCUITS

Petitioners have asserted that their right to avoid moral and religious indoctrination of their very young children stems from a combination of due process rights enunciated in the Free Exercise Clause, the fundamental right of parents to raise their children, and the rights of privacy related to intimate family associations. (App. C27-28)

This combination of fundamental rights was specifically pled as a "hybrid rights" claim pursuant to Employment Div. v. Smith, 494 U.S. 872, 876-77 (1990). Because the parameters of such claims have generated enormous controversy, certiorari should be granted to provide guidance to the lower courts concerning the manner and means of construing them.

In Smith, this court utilized the "rational relationship" test to uphold an Oregon drug law that was alleged to have impinged upon certain religious groups' desire to use peyote in its ritual. However, the Court reiterated the vitality of the long line of cases that preserve parental rights regarding faith. E.g., Yoder, 406 U.S. at 233. Such cases had utilized a higher standard of review to strike down laws that infringed upon parental rights.

Distinguishing these earlier cases, the Smith Court stated that "[t]he only decisions in which we have held the First Amendment bars

application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . . ." Smith, 494 U.S. at 881. The Court ruled that heightened scrutiny should be applied to the "hybrid situation" where "the interests of parenthood are combined with a free exercise claim." Id. at 882 n.1 (quoting Yoder, 406 U.S. at 233).

Ruling against the petitioners, the First Circuit here noted that Smith's enunciation of "hybrid situations" has led to a great deal of discussion and disagreement. (App. A-16) (citing E. Chemerinsky, *Constitutional Law* § 12.3.2.3, at 1262 (3d ed. 2006) (noting different treatments of the hybrid rights language by the lower courts). See also Steven H. Aden & Lee J. Stang, When a "Rule" Doesn't Rule: The Failure of the Oregon Employment Division v. Smith Hybrid Rights Exception, 108 Penn. St. L. Rev. 573 (2003). The First Circuit recognized that observers can not determine "whether Smith created a new hybrid rights doctrine, or whether in discussing 'hybrid situations' the Court was merely noting in descriptive terms that it was not overruling certain cases such as Pierce and Yoder." (App. A19) (Comparing, Michael E. Lechliter, Note, The Free Exercise of Religion and Public Schools: The Implication of Hybrid Rights on the Religious Upbringing of Children, 103 Mich. L. Rev. 2209, 2220-21 (2005), with M.W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109, 1121-22 (1990)). Individual justices of this court have added to the

controversy. See Church of Lukumi Babalu Aye., Inc., 508 U.S. at 567 (Souter, J. concurring) (describing hybrid rights as untenable distinction).

This controversy has led to split among the circuits. At least one circuit has described the "hybrid rights" concept as unworkable. Kissinger v. Bd. of Tr. of the Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993); Accord, Watchtower Bible and Tract Soc'y of New York, Inc. v. Village of Stratton, 240 F.3d 533 (6th Cir. 2001), cert. granted, 534 U.S. 971, rev'd, 536 U.S. 150 (2002). On the other hand, the Eighth Circuit follows the Court's language closely and in its own words has "breathed life" into hybrid claims that had been dismissed. Cornerstone Bible Church v. City of Hastings, 948 F.2d. 464, 473 (8th Cir. 1991).

Regardless of which position one takes, the controversy is real and ongoing. Smith's use of the phrase "hybrid situations" leaves open a complex and fundamental question begging for this Court's resolution: how and to what extent the Free Exercise Clause continues to support parents' fundamental rights to raise their own children in a complex pluralistic society.

The instant case presents the perfect opportunity for the Court to address that very question. The petitioners have asserted exactly those claims the Smith Court envisioned when it created the "hybrid rights" doctrine in the first instance. Count I of the complaint is specifically crafted as a "hybrid rights" claim. (App. C27-28) At both the District Court and Circuit level, the applicability of Smith was thoroughly briefed and

argued. The First Circuit opinion recognizes this as well. (App. A11-18)

In Smith, this Court enunciated an express and specific concern with the correlation between religion and parenthood. Smith, 494 U.S. at 882. This Court should therefore allow certiorari to expand upon the Smith rubric, and clarify its meaning.

## CONCLUSION

The Writ of Certiorari should be granted.

Respectfully Submitted,

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United States Court of Appeals
For the First Circuit

No. 07-1528

David PARKER; Tonia Parker; Joshua Parker; Jacob Parker; Joseph Robert Wirthlin; Robin Wirthlin; Joseph Robert Wirthlin, Jr.,

Plaintiffs, Appellants,

v.

William HURLEY; Paul B. Ash; Helen Lutton; Thomas R. Diaz; Olga Guttag; Scott Burson; Andre Ravenelle; Joni Jay; Jennifer Wolfrum; Heather Kramer; Town of Lexington; Thomas Griffith,

Defendants, Appellees.

Appeal from the United States District Court
of the District of Massachusetts
[Hon. Mark L. Wolf, U.S. District Judge]

Before
Lynch, Circuit Judge,
Stahl, Senior Circuit Judge,
and Howard, Circuit Judge.

Robert S. Sinsheimer, with whom Jeffrey A. Denner, Neil Tassel, and Denner Pellegrino, LLP, were on brief for appellants.

John K. Davis with whom Pierce, Davis & Perritano, LLP, was on brief for appellees.

Eben A. Krim, Mark W. Batten, Proskauer Rose, LLP, Sarah R. Wunsch, ACLU Foundation of Massachusetts, Kenneth Y. Choe, James D. Esseks, and ACLU Foundation on brief for American Civil Liberties Union; American Civil Liberties Union of Massachusetts; Lexington Community Action for Responsible Education and Safety; Lexington Education Association; Massachusetts Teachers Association; and Respecting Differences, amici curiae.

Harvey J. Wolkoff, Bonnie S. McGuire, Ropes & Gray LLP, Robert O. Trestan, Steven M. Freeman, Steven C. Sheinberg, Deborah Cohen, and Anti-Defamation League on brief for Anti-Defamation League, amicus curiae.

Nima R. Eshghi, Mary L. Bonauto, Gary D. Buseck, and Gay & Lesbian Advocates & Defenders on brief for Gay & Lesbian Advocates & Defenders; Gay, Lesbian & Straight Education Network; Greater Boston Parents, Families and Friends of Lesbians and Gays; Human Rights Campaign, Human Rights Campaign Foundation; and the Massachusetts Women's Bar Association, amici curiae.

January 31, 2008

Lynch, Circuit Judge.

Two sets of parents, whose religious beliefs are offended by gay marriage and homosexuality, sued the Lexington, Massachusetts school district in which their young children are enrolled. They assert that they must be given prior notice by the school and the opportunity to exempt their young children from exposure to books they find religiously repugnant. Plaintiffs assert violations of their own and their children's rights under the Free Exercise Clause and their substantive parental and privacy due process rights under the U.S. Constitution.

The Parkers object to their child being presented in kindergarten and first grade with two books that portray diverse families, including families in which both parents are of the same gender. The Wirthlins object to a second-grade teacher's reading to their son's class a book that depicts and celebrates a gay marriage. The parents do not challenge the use of these books as part of a nondiscrimination curriculum in the public schools, but challenge the school district's refusal to provide them with prior notice and to allow for exemption from such instruction. They ask for relief until their children are in seventh grade.

Massachusetts does have a statute that requires parents be given notice and the opportunity to exempt their children from curriculum which primarily involves human sexual education or human sexuality issues. Mass. Gen. Laws ch. 71, § 32A. The school system has declined to apply this statutory exemption to these plaintiffs on the basis that the materials do not primarily involve human sexual education or human sexuality issues.

The U.S. District Court dismissed plaintiffs' complaint for failure to state a federal constitutional claim upon which relief could be granted. Fed.R.Civ.P. 12(b)(6); Parker v. Hurley, 474 F.Supp.2d 261, 263 (D.Mass.2007). Plaintiffs appeal.

I.

Because plaintiffs appeal the dismissal of their complaint under Rule 12(b)(6), we take the allegations in their complaint as true and draw all reasonable inferences in plaintiffs' favor. Otero v. Commonwealth of P.R. Indus. Comm'n, 441 F.3d 18, 20 (1st Cir.2006).

In addition to the complaint, we consider the three books plaintiffs find objectionable.[1] We also take notice of the statewide curricular standards of the Commonwealth of Massachusetts and start with those to put this dispute in context.

*A. Massachusetts Statewide Curricular Standards*

The Commonwealth of Massachusetts enacted a comprehensive education reform bill in 1993, requiring the State Board of Education (SBE) to establish academic standards for core subjects. Mass. Gen. Laws ch. 69, § 1D. The statute mandates that the standards "be designed to

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[1] Normally, documents not included in the original pleading cannot be considered on a Rule 12(b)(6) motion without converting the motion into one for summary judgment. Fed.R.Civ.P. 12(b). However, "courts have made narrow exceptions for documents the authenticity of which are not disputed by the parties; for official records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint." Watterson v. Page, 987 F.2d 1, 3 (1st Cir.1993).

inculcate respect for the cultural, ethnic and racial diversity of the commonwealth." Id. Further, "[a]cademic standards shall be designed to avoid perpetuating gender, cultural, ethnic or racial stereotypes." Id.; see also id. § 1E (requiring same for the establishment of curricular frameworks). The statute does not specify sexual orientation in these lists.

The SBE established such standards, including a Comprehensive Health Curriculum Framework in 1999. That Framework establishes Learning Standards, which set different measurable goals for students in pre-kindergarten through grade 5, grades 6-8, and grades 9-12. The Health Framework also specifically notes that "public schools must notify parents before implementing curriculum that involves human sexuality."

Within the Framework are Strands, and Strands have different components. Under the Social and Emotional Health Strand, there is a Family Life component, which states:

> Students will gain knowledge about the significance of the family on individuals and society, and will learn skills to support the family, balance work and family life, be an effective parent, and nurture the development of children.

The Learning Standard for elementary school grades under the Family Life component states that children should be able to "[d]escribe different types of families."

In addition, the Social and Emotional Health Strand includes an Interpersonal Relationships component. That component provides:

> Students will learn that relationships with others are an integral part of the human life

experience and the factors that contribute to healthy interpersonal relationships, and will acquire skills to enhance and make many of these relationships more fulfilling through commitment and communication.

The associated Learning Standard for pre-kindergarten through grade 5 recommends that children be able to "[d]escribe the concepts of prejudice and discrimination."

It is not until grades 6-8 that the Learning Standards under this component address "the detrimental effect of prejudice (such as prejudice on the basis of race, gender, sexual orientation, class, or religion) on individual relationships and society as a whole."

There is also a Reproduction/Sexuality component under the Physical Health Strand. Within that component, the Learning Standards provide that by grade 5, students should be able to "[d]efine sexual orientation using the correct terminology (such as heterosexual, and gay and lesbian)."

These statewide academic standards do not purport to select particular instructional materials, but only to be a guide to assist others in that selection. Mass. Gen. Laws ch. 69, § 1E. Thus, there is no statewide regulation or policy providing for the use of the particular texts in dispute here.

By statute, the actual selection of books is the responsibility of a school's principal, with the approval of the superintendent of schools. Mass. Gen. Laws ch. 71, § 48. We assume these books were chosen locally subject to the terms of that statute. Plaintiffs allege in their complaint that Lexington school officials began integrating books like these into their elementary school's curriculum

at the behest of gay rights advocates. Compl. ¶¶ 32-33.

In 1996, the Massachusetts legislature adopted a parental notification statute to be implemented by schools starting with the 1997-1998 school year. Mass. Gen. Laws ch. 71, § 32A. Section 32A requires school districts to provide parents with notice of and an opportunity to exempt their children from "curriculum which primarily involves human sexual education or human sexuality issues." The Commissioner of Education, in an advisory opinion guiding the implementation of the new law, noted that it was intended to apply to discrete curricular units, such as "any courses (typically, sex education or portions of a health education or science course), school assemblies or other instructional activities and programs."[2] Schools must make the relevant curricular materials available for parents to review, though they do not necessarily have to allow parents to observe the classes. The statute mandates that the Department of Education promulgate regulations for resolving any disputes arising under section 32A, which the Department has done. See 603 Mass. Code Regs. 5.01 et seq. Lexington has a section 32A policy in place.

On November 18, 2003, a divided Supreme Judicial Court of Massachusetts held, in Goodridge

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[2] That statute has been interpreted in an opinion letter by the Department of Education not to apply to educational materials designed to promote tolerance, including materials recognizing differences in sexual orientation, if those materials are presented "without further instruction or discussion of the physical and sexual implications of homosexuality."

v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003), that the state constitution mandates the recognition of same-sex marriage. A later effort to reverse this decision through the mechanism of a constitutional convention and a popular vote failed.

*B. The Parkers*

David and Tonia Parker's sons, Jacob and Joshua Parker, and Joseph and Robin Wirthlin's son, Joseph Robert Wirthlin, Jr., are students at Estabrook Elementary School in Lexington, Massachusetts. Both families assert that they are devout Judeo-Christians and that a core belief of their religion is that homosexual behavior and gay marriage are immoral and violate God's law.

In January 2005, when Jacob Parker ("Jacob") was in kindergarten, he brought home a "Diversity Book Bag." This included a picture book, Who's in a Family?, which depicted different families, including single-parent families, an extended family, interracial families, animal families, a family without children, and-to the concern of the Parkers-a family with two dads and a family with two moms. The book concludes by answering the question, "Who's in a family?": "The people who love you the most!" The book says nothing about marriage.

The Parkers were concerned that this book was part of an effort by the public schools "to indoctrinate young children into the concept that homosexuality and homosexual relationships or marriage are moral and acceptable behavior." Compl. ¶ 30. Such an effort, they feared, would require their sons to affirm a belief inconsistent with their religion. Id. ¶ 33. On January 21, 2005,

they met with Estabrook's principal, Joni Jay ("Jay"), to request that Jacob not be exposed to any further discussions of homosexuality. Principal Jay disagreed that the school had any obligation under section 32A to notify parents in advance of such class discussions. In March 2005, the Parkers repeated their request that "no teacher or adult expose [Jacob] to any materials or discussions featuring sexual orientation, same-sex unions, or homosexuality without notification to the Parkers and the right to 'opt out,' " this time including in their communication the then-Superintendent of Lexington's schools, William Hurley ("Hurley"), and two other district-wide administrators. Id. ¶ 34. This request was met with the same response. A further meeting to discuss these issues was held at Estabrook on April 27, 2005, which resulted in Mr. Parker's arrest when he refused to leave the school until his demands were met.

As the 2005-2006 school year began, Paul Ash ("Ash"), the current Superintendent, released a public statement explaining the school district's position that it would not provide parental notification for "discussions, activities, or materials that simply reference same-gender parents or that otherwise recognize the existence of differences in sexual orientation." When Jacob entered first grade that fall, his classroom's book collection included Who's in a Family? as well as Molly's Family, a picture book about a girl who is at first made to feel embarrassed by a classmate because she has both a mommy and a mama but then learns that families can come in many different varieties. In December 2005, the Parkers repeated their request for advance notice, which Superintendent Ash again denied.

*C. The Wirthlins*

We turn to the other plaintiff family.

In March 2006, an Estabrook teacher read aloud King and King to her second grade class, which included Joseph Robert Wirthlin, Jr. ("Joey"). This picture book tells the story of a prince, ordered by his mother to get married, who first rejects several princesses only to fall in love with another prince. A wedding scene between the two princes is depicted. The last page of the book shows the two princes kissing, but with a red heart superimposed over their mouths. There is no allegation in the complaint that the teacher further discussed the book with the class. That evening, Joey told his parents about the book; his parents described him as "agitated" and remembered him calling the book "so silly." Id. ¶ 57. Eventually the Wirthlins were able to secure a meeting with the teacher and Jay on April 6, 2006, to object to what they considered to be indoctrination of their son about gay marriage in contravention of their religious beliefs. Jay reiterated the school district's position that no prior notice or exemption would be given.

*D. Procedural History*

On April 27, 2006, the Parkers and the Wirthlins filed suit on behalf of themselves and their children in federal district court against Hurley, Ash, Jay, and Joey Wirthlin's teacher, as well as the town of Lexington, the members of its school board, and other school district administrators.

The complaint alleges that the public schools are systematically indoctrinating the Parkers' and the Wirthlins' young children contrary to the

parents' religious beliefs and that the defendants held "a specific intention to denigrate the [families'] sincere and deeply-held faith." Id. ¶ 66. They claim, under 42 U.S.C. § 1983, violations of their and their children's First Amendment right to the free exercise of religion and of their Fourteenth Amendment due process right to parental autonomy in the upbringing of their children, as well as of their concomitant state rights.[3] They also assert a violation of the Massachusetts "opt out" statute, Mass. Gen. Laws ch. 71, § 32A.

The plaintiffs argue that their ability to influence their young children toward their family religious views has been undercut in several respects. First, they believe their children are too young to be introduced to the topic of gay marriage. They also point to the important influence teachers have on this age group. They fear their own inability as parents to counter the school's approval of gay marriage, particularly if parents are given no notice that such curricular materials are in use. As for the children, the parents fear that they are "essentially" required "to affirm a belief inconsistent with and prohibited by their religion." Compl. ¶ 33. The parents assert it is ironic, and unconstitutional under the Free Exercise Clause,

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[3] The plaintiffs also claim that defendants violated § 1983 by conspiring to deprive them of these constitutional rights. They do not assert an Establishment Clause claim. We note that the Supreme Judicial Court has held that the Massachusetts state constitution provides greater protection for free exercise claims then does the federal constitution. Attorney Gen. v. Desilets, 418 Mass. 316, 636 N.E.2d 233, 235-36 (1994). Plaintiffs brought their suit in federal court and have chosen not to request certification of any state law issues to the Supreme Judicial Court.

for a public school system to show such intolerance towards their own religious beliefs in the name of tolerance.

For relief, the plaintiffs seek a declaration of their constitutional rights; damages; and an injunction requiring the school (1) to provide an opportunity to exempt their children from "classroom presentations or discussions the intent of which is to have children accept the validity of, embrace, affirm, or celebrate views of human sexuality, gender identity, and marriage constructs," (2) to allow the parents to observe any such classroom discussions, and (3) to not present any "materials graphically depicting homosexual physical contact" to students before the seventh grade.[4]

The defendants moved to dismiss for failure to state a claim upon which relief could be granted. Fed.R.Civ.P. 12(b)(6). After hearing oral arguments, the district court granted the defendants' motion on February 23, 2007. The court dismissed the state claims without prejudice so that they could be reasserted in state court. Parker, 474 F.Supp.2d at 263.

As to the federal claims, the district court found this case indistinguishable from Brown v. Hot, Sexy & Safer Productions, 68 F.3d 525 (1st Cir.1995). In Brown, this circuit held that the Free Exercise

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[4] In the request for injunctive relief, plaintiffs also sought an opt-out right regarding "classroom presentations or discussions when the intent is to have children accept the validity of, embrace, affirm or celebrate belief systems or religious perspectives." Because the complaint does not allege any instance of such a classroom presentation or discussion, we do not further consider this particular claim for relief.

Clause and the parents' substantive due process rights were not violated by one instance of a school system's failure to provide prior notice and an exemption for a specific high school assembly on human sexuality. Holding that Brown was analytically identical to the present case, the district court applied rational basis review and concluded that the state's interest in preventing discrimination, specifically discrimination targeted at students in school, justified the policy of the Lexington schools. Parker, 474 F.Supp.2d at 268, 274-75.

II.

Our review of the district court's order of dismissal is de novo. Otero, 441 F.3d at 20. Plaintiffs' "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true." Bell Atl. Corp. v. Twombly, --- U.S. ----, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007) (citations omitted). We affirm the order of dismissal, albeit on grounds different from the district court's reasoning. See Otero, 441 F.3d at 20.

There are several ways to approach the parents' claim depending upon how this case is categorized. One could start by asking how strong the school's interest must be to justify the denial of the parents' request for an exemption (as opposed to asking about the nature of the plaintiffs' interests, as we do below). The parties have focused on the standard of justification the defendants must meet in the aftermath of Employment Division v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

What is clear from Smith is that not all free exercise challenges will survive motions to dismiss and not all will receive strict scrutiny review.

One possible answer is that, under Smith, the school may have to show no more than that its choice of books and its refusal to provide exemption are rational. In Smith, the Court rejected the plaintiffs' claim that they had unconstitutionally been denied unemployment benefits due to their violation of Oregon's general criminal prohibition on the use of peyote, even though they had used the peyote for religious purposes. The Court found no free exercise objection to the criminal statute's enforcement because, as it summarized in a later case, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

If Smith's mere rationality test were the applicable standard, this case would easily be dismissed. Plaintiffs do not contest that the defendants have an interest in promoting tolerance, including for the children (and parents) of gay marriages. The Supreme Court has often referred to the role of public education in the preparation of students for citizenship. See, e.g., Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681-85, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (upholding ability of schools to prohibit lewd speech). Given that Massachusetts has recognized gay marriage under its state constitution, it is entirely rational for its

schools to educate their students regarding that recognition.[5]

In plaintiffs' favor, however, we will assume their case is not necessarily subject to this general Smith rule. First, the case does not arise in the same context as Smith. Plaintiffs have not engaged in conduct prohibited by state law or otherwise sought to avoid compliance with a law of general applicability.[6] Nor does state law or a formal policy require that the defendants take the actions they did. Indeed, there is not even a formal, district-wide policy of affirming gay marriage through the use of such educational materials with young students.

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[5] We do not reach the question of whether there is a compelling interest, either state or federal, in teaching tolerance for gay marriage to elementary school students in the public school system. Cf. Bob Jones Univ. v. United States, 461 U.S. 574, 604, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983) (holding that federal government's compelling interest in eradicating racial discrimination outweighed plaintiffs' free exercise claim); Moore v. City of E. Cleveland, 431 U.S. 494, 499-500, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (holding that city lacked compelling justification for impinging on due process right of familial privacy).

[6] In City of Boerne v. Flores, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), the Supreme Court appeared to assume that Smith would apply to non-criminal regulations such as zoning ordinances. Id. at 535, 117 S.Ct. 2157. At least four circuits have held that Smith is not limited to criminal prohibitions. Fairbanks v. Brackettville Bd. of Educ., No. 99-50265, 2000 WL 821401, at *2 (5th Cir. May 30, 2000); Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir.1999); Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927, 932 (6th Cir.1991); Salvation Army v. Dep't of Cmty. Affairs, 919 F.2d 183, 194-96 (3d Cir.1990); see also Gary S. v. Manchester Sch. Dist., 374 F.3d 15, 18-19 (1st Cir.2004) (refusing to limit the Smith rule to statutes related to socially harmful conduct).

In contrast to the mere rationality standard for neutral laws of general applicability, Smith and its progeny require a compelling justification for any law that targets religious groups. See Lukumi, 508 U.S. at 546, 113 S.Ct. 2217 (invalidating law targeting religious group). This case also does not fit into the "targeting" category, as the Supreme Court has used the phrase. The school was not singling out plaintiffs' particular religious beliefs or targeting its tolerance lessons to only those children from families with religious objections to gay marriage. Cf. id. at 542, 113 S.Ct. 2217. The fact that a school promotes tolerance of different sexual orientations and gay marriage when such tolerance is anathema to some religious groups does not constitute targeting.

The Smith Court, in our view, left open other possible approaches. The Court in Smith did not say it overruled any prior free exercise cases. For example, it reinterpreted the balancing test of Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963),[7] under which the court "asks whether the government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden," Hernandez v. Comm'r, 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989). Smith clarified that the Sherbert test does not apply to violations of a general prohibition. Smith, 494 U.S. at 883-85, 110 S.Ct. 1595. The Court expressed unwillingness to

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[7] But cf. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006) (describing Smith as "reject[ing] the interpretation of the Free Exercise Clause announced in Sherbert ").

apply the Sherbert test outside the unemployment compensation cases in which it had found free exercise violations, id. at 883, 110 S.Ct. 1595, explaining that the Sherbert approach was "developed in a context that lent itself to individualized governmental assessment" of each plaintiff's "particular circumstances," id. at 884, 110 S.Ct. 1595. Thus it summarized the Sherbert line of cases as "stand[ing] for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." Id. Plaintiffs have not argued that they fit within this redefinition of Sherbert, so we do not address the theory.[8]

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[8] Plaintiffs have not argued, for example, that the Commonwealth, having provided an exemption for sex education under Mass. Gen. Laws ch. 71, § 32A, is compelled by either the state or federal constitution to extend the exemption to this situation.Indeed, there are factual distinctions between the two situations. Sex education as referred to in section 32A is usually set out as an independent course segment at prearranged times and places. Notice and exemption is thus far easier to accomplish. By contrast, the notice and exemption requested here would require broad advance notice of "any adult-directed or initiated classroom discussions of sexuality, gender identity, and marriage constructs," discussions that could arise often in almost any part of the curriculum.Plaintiffs do point out, however, that because this case was decided on a motion to dismiss, the defendants have put on no evidence that the school system would bear any burden if required to give them this notice and exemption. Defendants have not, for instance, argued that granting the plaintiffs an exemption from such classroom instruction would violate the Establishment Clause. See Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144-45, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987) ("[G]overnment may (and sometimes must) accommodate religious practices ... without violating the Establishment Clause.").Amici,

Smith, by its terms, also carved out an area of "hybrid situations." Id. at 881-82, 83 S.Ct. 1790. Plaintiffs argue this is where their claim fits. Smith described such hybrid situations as involving free exercise claims brought in conjunction with other claims of violations of constitutional protections. Smith gave as one example of a companion claim "the right of parents ... to direct the education of their children," citing to Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), and Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). Smith, 494 U.S. at 881, 110 S.Ct. 1595. In this hybrid category, Smith also included cases of compelled expression decided on free speech grounds, but which also involved freedom of religion, such as West Virginia Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). Smith, 494 U.S. at 882, 110 S.Ct. 1595. The Smith Court commented that only in these hybrid situations had the Court ever held that "the First Amendment bar[red] application of a neutral, generally applicable law to religiously motivated action." Id. at 881, 110 S.Ct. 1595.

What the Court meant by its discussion of "hybrid situations" in Smith has led to a great deal of discussion and disagreement. See, e.g., E. Chemerinsky, Constitutional Law § 12.3.2.3, at

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however, argue that such exemptions would significantly burden the schools because (1) there would be an exodus from classrooms if plaintiffs received the relief requested and that (2) this in turn would send a message that children of same-sex parents are inferior. This is mere supposition and may not be credited on a motion to dismiss, where inferences must be drawn in the plaintiffs' favor. Plaintiffs argue for their part that the remedy they seek would teach other students tolerance of different religious beliefs.

1262 (3d ed. 2006) (noting different treatments of the hybrid rights language by the lower courts). Observers debate whether Smith created a new hybrid rights doctrine, or whether in discussing "hybrid situations" the Court was merely noting in descriptive terms that it was not overruling certain cases such as Pierce and Yoder. Compare M.E. Lechliter, Note, The Free Exercise of Religion and Public Schools: The Implication of Hybrid Rights on the Religious Upbringing of Children, 103 Mich. L. Rev. 2209, 2220-21 (2005), with M.W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109, 1121-22 (1990). Courts and commentators also disagree over how strong the companion constitutional claim must be to establish a hybrid situation: whether, for example, the associated claim must be independently viable, or whether it is enough for the claim to be "colorable." See, e.g., Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir.1999) (requiring a colorable claim that another constitutional right has been violated); Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (10th Cir.1998) (same); Lechliter, supra, at 2226-33 (identifying and describing disagreement among courts).[9] Yet another debate is whether such

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[9] Others have interpreted this circuit's decision in Brown as falling into the former category-that is, requiring an independently viable constitutional claim. See, e.g., Lechliter, supra, at 2226-27; R.C. Miller, Annotation, What Constitutes "Hybrid Rights" Claim, 163 A.L.R. Fed. 493 § 6. Brown did not explicitly consider this debate, and the parental rights claim asserted in that case was found to be so weak that it was not a colorable claim, much less an independently viable one. Thus we do not read Brown as having settled this question or as firmly establishing that Smith created a new category of hybrid claims.

"hybrid" cases automatically subject the governmental defendant to the compelling state interest test.[10] Plaintiffs argue that they have pled a hybrid claim and that this entitles them to strict scrutiny review, which requires defendants to demonstrate a compelling state interest.

No published circuit court opinion, including Brown, has ever applied strict scrutiny to a case in which plaintiffs argued they had presented a hybrid claim. See, e.g., Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 764-65 (7th Cir.2003); Henderson v. Kennedy, 253 F.3d 12, 19 (D.C.Cir.2001); Miller, 176 F.3d at 1208; Swanson, 135 F.3d at 700; Salvation Army v. Dep't of Cmty. Affairs, 919 F.2d 183, 199-200 & n. 9 (3d Cir.1990).[11] As for this circuit, Brown noted that Yoder survived Smith, but then explained that the facts in Brown were far from analogous to the unique facts of Yoder, and held that no hybrid

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[10] There is no occasion here to consider whether there might be an intermediate step in which the degree of justification may vary with the type of burden asserted. See, e.g., Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 & n. 7 (3d Cir.1999) (applying intermediate scrutiny because the plaintiffs' claim arose in the public employment context).

[11] A Ninth Circuit panel did apply strict scrutiny, but that opinion was later withdrawn by the court en banc. Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 714-17 (9th Cir.1999), vacated by 220 F.3d 1134 (9th Cir.2000). The D.C. Circuit opinion in EEOC v. Catholic University of America, 83 F.3d 455 (D.C.Cir.1996), might be read as implying that strict scrutiny would apply in hybrid situations, but its brief discussion of hybrid rights was merely an alternate ground for its holding. See id. at 467.

claim was presented.[12] Brown, 68 F.3d at 539. Other circuits have held explicitly that Smith does not create a new category of hybrid claims. See, e.g., Leebaert v. Harrington, 332 F.3d 134, 143-44 (2d Cir.2003); Kissinger v. Bd. of Trs., 5 F.3d 177, 180 (6th Cir.1993); see also Lukumi, 508 U.S. at 567, 113 S.Ct. 2217 (Souter, J., concurring) (describing the hybrid distinction drawn by Smith as "ultimately untenable").

Without entering the fray over the meaning and application of Smith's "hybrid situations" language, we approach the parents' claims as the Court did in Yoder. In that case, the Court did not analyze separately the due process and free exercise interests of the parent-plaintiffs, but rather considered the two claims interdependently, given that those two sets of interests inform one other.[13]

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[12] Also, in Gary S. v. Manchester School District, 374 F.3d 15 (1st Cir.2004), this court held that no hybrid claim was presented by a disabled private school student's parents, who argued that their son was entitled to all the same services under IDEA as public school students. Id. at 19 (endorsing Gary S. v. Manchester Sch. Dist., 241 F.Supp.2d 111, 121 (D.N.H.2003)). The failure to provide those IDEA benefits to private school students does not impose any cognizable burden upon the religion of those who choose private schools. Id. at 20.

[13] While some have criticized the hybrid rights concept, saying it tries to make something out of nothing, see Henderson, 253 F.3d at 19 ("[I]n law as in mathematics zero plus zero equals zero."), others have noted that "it is equally true that the sum of a number of fractions-one-half plus one-half, for example-may equal one," R.F. Duncan, Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi, and the General Applicability Requirement, 3 U. Pa. J. Const. L. 850, 858 (2001).In the criminal law, we have recognized that at times the cumulative effect of a series of individual rulings, none of which individually constituted error, could mean the trial was

See Yoder, 406 U.S. at 213-14, 232-34, 92 S.Ct. 1526. We do not need to resolve the hybrid rights debate because the level of justification the government must demonstrate-a rational basis, a compelling interest, or something in between-is irrelevant in this case. While we accept as true plaintiffs' assertion that their sincerely held religious beliefs were deeply offended, we find that they have not described a constitutional burden on their rights, or on those of their children.

Even if Smith largely set aside in free exercise jurisprudence, at least in some contexts, "the balancing question-whether the state's interest outweighs the plaintiff's interest in being free from interference," it did not alter the standard constitutional threshold question. N.M. Stolzenberg, " He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 Harv. L. Rev. 581, 592-93 (1993). That question is "whether the plaintiff's free exercise is interfered with at all." Id.; see also Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451-52, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988) (denying a free exercise claim despite potential "devastating effects on traditional Indian religious practices" because "the Constitution simply does not provide a principle that could

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not fair, United States v. Sepulveda, 15 F.3d 1161, 1195-96 (1st Cir.1993), though we do not conclude that this is an appropriate analogy. As in Brown, we do not settle the question of what must be pled to raise a viable hybrid claim, as Smith uses the term. Our point here is rather that parental rights and the free exercise of religion by parents are interests that overlap and inform each other, and thus are sensibly considered together.

justify upholding respondents' legal claims"); Bauchman ex rel. Bauchman v. W. High Sch., 132 F.3d 542, 557 (10th Cir.1997) (requiring plaintiff asserting a free exercise claim to demonstrate burden, either through coercion or compulsion). In this case there is no pleading of a constitutionally significant burden on plaintiffs' rights.

In Yoder, the Court found unconstitutional Wisconsin's application of its compulsory school attendance law to Amish parents who believed that any education beyond eighth grade undermined their entire, religiously focused way of life. 406 U.S. at 235-36, 92 S.Ct. 1526. The heart of the Yoder opinion is a lengthy consideration of "the interrelationship of belief with [the Amish] mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization," and how as a result compulsory high school education would "substantially interfer[e] with the religious development of the Amish child and his integration into the way of life of the Amish faith community." Id. at 218, 235, 92 S.Ct. 1526. The Court thus found Wisconsin's compulsory attendance law to be flatly incompatible with the plaintiffs' free exercise rights and parental liberty interests, which it considered in tandem. That is, compulsory attendance at any school-whether public, private, or home-based-prevented these Amish parents from making fundamental decisions regarding their children's religious upbringing and effectively overrode their ability to pass their religion on to their children, as their faith required. Id. at 233-35, 92 S.Ct. 1526. Further, the parents in Yoder were able to demonstrate that their alternative informal vocational training of their older children still met

the state's professed interest behind its compulsory attendance requirement. Id. at 235, 92 S.Ct. 1526.

To the extent that Yoder embodies judicial protection for social and religious "sub-groups from the public cultivation of liberal tolerance," plaintiffs are correct to rely on it. See Stolzenberg, supra, at 637. But there are substantial differences between the plaintiffs' claims in Yoder and the claims raised in this case. One ground of distinction is that the plaintiffs have chosen to place their children in public schools and do not live, as the Amish do, in a largely separate culture. There are others. While plaintiffs do invoke Yoder's language that the state is threatening their very "way of life," they use this language to refer to the centrality of these beliefs to their faith, in contrast to its use in Yoder to refer to a distinct community and life style. Exposure to the materials in dispute here will not automatically and irreversibly prevent the parents from raising Jacob and Joey in the religious belief that gay marriage is immoral. Nor is there a criminal statute involved, or any other punishment imposed on the parents if they choose to educate their children in other ways. They retain options, unlike the parents in Yoder. Tellingly, Yoder emphasized that its holding was essentially sui generis, as few sects could make a similar showing of a unique and demanding religious way of life that is fundamentally incompatible with any schooling system. See Yoder, 406 U.S. at 235-36, 92 S.Ct. 1526. Plaintiffs' case is not Yoder.

Despite defendants' contention, plaintiffs' case is also not Brown. Brown concerned a federal constitutional challenge to a one-time failure by a Massachusetts high school to comply with the notice and exemption procedures required by Mass.

Gen. Laws ch. 71, § 32A, for a student's attendance at a discrete sex education assembly. Brown is factually and legally distinct. Most significantly, Brown involved the education of high school students, not the education of kindergarten through second-grade students. Educators treat this age differential as significant. The statewide curricular standards themselves, including those related to sexual orientation, distinguish between elementary and high school students. Further, as the plaintiffs sensibly point out, high school students are less responsive to what adults say than are very young elementary school children.

The impressionability of young school children has been noted as a relevant factor in the Establishment Clause context. See, e.g., Lee v. Weisman, 505 U.S. 577, 592, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (identifying concerns about the "subtle coercive pressure [of state endorsement of religion] in the elementary and secondary public schools"); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 307, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (Goldberg, J., concurring) (expressing concern about the impact of school prayer and Bible reading on "young impressionable children"); L.H. Tribe, American Constitutional Law, § 14-5, at 1177-79 (2d ed. 1988). Just as university students "are less impressionable than younger students" when it comes to school policies regarding religion, Widmar v. Vincent, 454 U.S. 263, 274 n. 14, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), so also are high school students less impressionable than the very youngest children, see Lemon v. Kurtzman, 403 U.S. 602, 616, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) (noting that "inculcating religious doctrine is ... enhanced by the impressionable age of the pupils,

in primary schools particularly"); see also Fleischfresser v. Dirs. of Sch. Dist. 200, 15 F.3d 680, 686 (7th Cir.1994).

The relevance of the age of school children has been noted in a free speech case involving religious expression. Curry ex rel. Curry v. Hensiner, 513 F.3d 570, ----, 2008 WL 141076, at *6 (6th Cir.2008). The age of the student has also been identified as relevant in the context of parental due process rights. See C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 185 (3d Cir.2005) (recognizing that "introducing a child to sensitive topics before a parent might have done so herself can complicate and even undermine parental authority").

We see no principled reason why the age of students should be irrelevant in Free Exercise Clause cases. See, e.g., M. Eichner, Who Should Control Children's Education?: Parents, Children, and the State, 75 U. Cin. L. Rev. 1339, 1382, 1386 (2007) (age of children should be taken into account when considering parental due process or free exercise claims in the public school context). Based on this distinction alone, Brown does not control this case.

We turn afresh to plaintiffs' complementary due process and free exercise claims. Plaintiffs' opening premise is that their rights of parental control are fundamental rights.[14] They rely on a Supreme

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[14] In Washington v. Glucksberg, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), the Court listed fundamental rights protected by the Due Process Clause. Id. at 719-20, 117 S.Ct. 2258. The Fourteenth Amendment guarantees that no state may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. That due process right has both a procedural and a substantive component: it ensures fair process, and it "provides

Court decision recognizing a substantive due process right of parents "to make decisions concerning the care, custody, and control of their children." Troxel v. Granville, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion). Troxel is not so broad as plaintiffs assert. The cases cited by the Court in Troxel as establishing this parental right pertain either to the custody of children, which was also the issue in dispute in Troxel, or to the fundamental control of children's schooling, as in Yoder. See id. at 65-66, 120 S.Ct. 2054.[15] The Troxel plurality did not, however, specifically address which standard of review to apply when this due process right is implicated.

The schooling cases cited in Troxel "evince the principle that the state cannot prevent parents from choosing a specific educational program." Brown, 68 F.3d at 533 (emphasis added). In Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), the Supreme Court found unconstitutional a prohibition on the teaching of foreign languages to young children in part because

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heightened protection against government interference with certain fundamental rights and liberty interests." Glucksberg, 521 U.S. at 720, 117 S.Ct. 2258.

[15] In slight variations on these themes, the Court also cited Parham v. J.R., 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979), which pertained to the power of parents to commit their children to mental institutions, and Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), in which the Court determined that the parent's liberty interest was outweighed in that instance by the state's interest in enforcing child labor and compulsory attendance laws.

it interfered with "the power of parents to control the education of their own." Id. at 401, 43 S.Ct. 625. Two years later, in Pierce v. Society of Sisters, the Court overturned an Oregon statute compelling children to attend public schools on the grounds that the statute "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing of children under their control." 268 U.S. at 534-35, 45 S.Ct. 571. Plaintiffs argue their request for notice and exemption is simply a logical extension of their parental rights under Meyer and Pierce, as reinforced by their free exercise rights.

Defendants respond that plaintiffs' argument runs afoul of the general proposition that, while parents can choose between public and private schools, they do not have a constitutional right to "direct how a public school teaches their child." Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395 (6th Cir.2005). That proposition is well recognized. See, e.g., C.N., 430 F.3d at 184 (recognizing a "distinction between actions that strike at the heart of parental decision-making authority on matters of the greatest importance and other actions that, although perhaps unwise and offensive, are not of constitutional dimension"); Leebaert, 332 F.3d at 141 (" Meyer, Pierce, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught."); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 291 (5th Cir.2001) ("It has long been recognized that parental rights are not absolute in the public school context and can be subject to reasonable regulation."); Swanson, 135 F.3d at 699 ("The case law in this area establishes that parents simply do not have a constitutional right to control

each and every aspect of their children's education ...."); see also Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1207 (9th Cir.2005), amended by 447 F.3d 1187 (9th Cir.2006). Indeed, Meyer and Pierce specified that the parental interests they recognized would not interfere with the general power of the state to regulate education, including "the state's power to prescribe a curriculum for institutions which it supports." Meyer, 262 U.S. at 402, 43 S.Ct. 625; see also Pierce, 268 U.S. at 534, 45 S.Ct. 571.

Plaintiffs say, in response, that they are not attempting to control the school's power to prescribe a curriculum. The plaintiffs accept that the school system "has a legitimate secular interest in seeking to eradicate bias against same-gender couples and to ensure the safety of all public school students." They assert that they have an equally sincere interest in the accommodation of their own religious beliefs and of the diversity represented by their contrary views. Plaintiffs specifically disclaim any intent to seek control of the school's curriculum or to impose their will on others. They do not seek to change the choice of books available to others but only to require notice of the books and an exemption, and even then only up to the seventh grade. Nonetheless, we have found no federal case under the Due Process Clause which has permitted parents to demand an exemption for their children from exposure to certain books used in public schools.

The due process right of parental autonomy might be considered a subset of a broader substantive due process right of familial privacy. See M.L.B. v. S.L.J., 519 U.S. 102, 116, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996). The other cases

establishing privacy rights under the Due Process Clause pertain to such issues as the right to marry, e.g., Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (state cannot outlaw miscegenation), and the right to procreate, e.g., Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (state cannot forcibly sterilize convicts), and are not relevant to plaintiffs' claims. In sum, the substantive due process clause by itself, either in its parental control or its privacy focus, does not give plaintiffs the degree of control over their children's education that their requested relief seeks. We turn then to whether the combination of substantive due process and free exercise interests give the parents a cause of action.

The First Amendment's prohibition on laws "respecting an establishment of religion, or prohibiting the free exercise thereof" applies to the states through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). In Smith, the Supreme Court noted that the "free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." 494 U.S. at 877, 110 S.Ct. 1595. As a result, the government may not, for example, (1) compel affirmation of religious beliefs; (2) punish the expression of religious doctrines it believes to be false; (3) impose special disabilities on the basis of religious views or religious status; or (4) lend its power to one side or the other in controversies over religious authorities or dogma. Id.[16]

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[16] While this case is not a funding case, the Court has most recently held that in such cases there is no significant burden on free exercise rights where, as here, the government has "impose[d] neither criminal nor civil sanctions on any type of

The Free Exercise Clause, importantly, is not a general protection of religion or religious belief. It has a more limited reach of protecting the free exercise of religion. In Lyng, the Court noted that there and in Bowen v. Roy, 476 U.S. 693, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986), no free exercise claim was stated even though "the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs." 485 U.S. at 449, 108 S.Ct. 1319. There was no free exercise problem in those cases because "[i]n neither case ... would the affected individuals be coerced by the Government's action into violating their religious beliefs." Id. As the Court said in Roy, "[n]ever to our knowledge has the Court interpreted the First Amendment to require the Government itself to behave in ways that the individual believes will further his or her spiritual development or that of his or her family." 476 U.S. at 699, 106 S.Ct. 2147; see also Sherbert, 374 U.S. at 412, 83 S.Ct. 1790 (Douglas, J., concurring) ("[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."). Specifically, "it is necessary in a free exercise case for one to show the coercive effect of the enactment

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religious service or rite," and where it "does not require students to choose between their religious beliefs and receiving a government benefit." Locke v. Davey, 540 U.S. 712, 720-21, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004). As here, the government in Locke made no attempt to regulate the plaintiffs' conduct. Id.; see D. Laycock, Supreme Court, 2003 Term-Case Comment: Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty, 118 Harv. L. Rev. 155, 214-15 (2004).

as it operates against him in the practice of his religion." Schempp, 374 U.S. at 223, 83 S.Ct. 1560.

Preliminarily, we mark the distinction between the alleged burden on the parents' free exercise rights and the alleged burden on their children's. The right of parents "to direct the religious upbringing of their children," Yoder, 406 U.S. at 233, 92 S.Ct. 1526, is distinct from (although related to) any right their children might have regarding the content of their school curriculum. See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16-18, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (where father lacked legal power to sue on behalf of his daughter, he could assert a right to influence her religious upbringing but lacked standing to challenge her exposure to ideas presented to her by third parties). But see id. at 24 n. 2, 124 S.Ct. 2301 (Rehnquist, C.J., concurring in the judgment) (Newdow's right should not be treated as distinct from his daughter's). This is not a new distinction. In Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), the Court explained that "two claimed liberties are at stake. One is the parent's, to bring up the child in the way [the parent desires], which for appellant means to teach him the tenets and the practices of their faith. The other freedom is the child's, to observe these [tenets and practices]." Id. at 164, 64 S.Ct. 438; see also Fleischfresser, 15 F.3d at 683-84. We start with the parents' claim.

Generally, the fundamental parental control/free exercise claims regarding public schools have fallen into several types of situations: claims that failure to provide benefits given to public

school students violates free exercise rights,[17] claims that plaintiffs should not be subjected to compulsory education,[18] demands for removal of offensive material from the curriculum,[19] and, as here, claims that there is a constitutional right to exemption from religiously offensive material.[20] See also M. Stewart, The First Amendment, the Public Schools, and the Incul ation of Community Values, 18 J.L. & Educ. 23, 86 (1989).

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[17] See, e.g., Gary S. v. Manchester Sch. Dist., 374 F.3d 15, 19-21 (1st Cir.2004); Swanson, 135 F.3d at 698, 702 (no due process or free exercise violation in school district's refusal to allow home-schooled students to attend public schools part-time).

[18] See, e.g., Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15; Murphy v. Arkansas, 852 F.2d 1039 (8th Cir.1988) (no due process or free exercise violation in state setting requirements for home schooling); Duro v. Dist. Attorney, 712 F.2d 96 (4th Cir.1983) (no Yoder-like constitutional problem with state statute prohibiting home schooling).

[19] See, e.g., Williams v. Bd. of Educ., 388 F.Supp. 93 (D.W.Va.1975) (no violation of free exercise or privacy rights in school's use of textbooks that offend plaintiffs' religious beliefs). The amici's attempts to fit plaintiffs' claim into this third type-removal of material from the school's curriculum-fails. Plaintiffs do not claim a general right of censorship, only that they have a right to notice and exemption.

[20] See, e.g., Leebaert, 332 F.3d 134 (no free exercise or parental due process right violated by school's refusal to exempt student from mandatory health class); Littlefield, 268 F.3d 275 (no parental due process or free exercise violation in refusal to exempt child from mandatory uniform policy); Morrison ex rel. Morrison v. Bd. of Educ., 419 F.Supp.2d 937 (E.D.Ky.2006) (no right to exempt child from mandatory school diversity training on homosexuality), rev'd on other grounds, 507 F.3d 494 (6th Cir.2007).

In two cases in which plaintiffs did not raise a related parental rights due process claim, federal courts have rejected free exercise claims seeking exemptions from the schools' assignment of particular books. In Fleischfresser, the parents sought to prevent the use of the Impressions Reading Series as a supplemental reading program for an elementary school. 15 F.3d at 683. The parents complained that the series fostered a belief in the existence of superior beings and indoctrinated their children in values such as despair, deceit, and parental disrespect, values different from their Christian beliefs. Id. at 683, 689. The Seventh Circuit held that any burden on free exercise rights was, at most, minimal. The parents were not precluded from meeting their religious obligation to instruct their children, nor were the parents or children compelled to do anything or refrain from doing anything of a religious nature. Thus, no coercion existed. Id. at 690.

In Mozert v. Hawkins County Board of Education, 827 F.2d 1058 (6th Cir.1987), which is more factually similar to this case, the Sixth Circuit rejected a broader claim for an exemption from a school district's use of an entire series of texts. The parents in that case asserted that the books in question taught values contrary to their religious beliefs and that, as a result, the school violated the parents' religious beliefs by allowing their children to read the books and violated their children's religious beliefs by requiring the children to read them. Id. at 1060. The court, however, found that exposure to ideas through the required reading of books did not constitute a constitutionally significant burden on the plaintiffs'

free exercise of religion. Id. at 1065. In so holding, the court emphasized that "the evil prohibited by the Free Exercise Clause" is "governmental compulsion either to do or refrain from doing an act forbidden or required by one's religion, or to affirm or disavow a belief forbidden or required by one's religion," and reading or even discussing the books did not compel such action or affirmation. Id. at 1066, 1069.

In the present case, the plaintiffs claim that the exposure of their children, at these young ages and in this setting, to ways of life contrary to the parents' religious beliefs violates their ability to direct the religious upbringing of their children. We try to identify the categories of harms alleged. The parents do not allege coercion in the form of a direct interference with their religious beliefs, nor of compulsion in the form of punishment for their beliefs, as in Yoder. Nor do they allege the denial of benefits. Further, plaintiffs do not allege that the mere listening to a book being read violated any religious duty on the part of the child. There is no claim that as a condition of attendance at the public schools, the defendants have forced plaintiffs-either the parents or the children-to violate their religious beliefs. In sum there is no claim of direct coercion.

The heart of the plaintiffs' free exercise claim is a claim of "indoctrination": that the state has put pressure on their children to endorse an affirmative view of gay marriage and has thus undercut the parents' efforts to inculcate their children with their own opposing religious views. The Supreme Court, we believe, has never utilized an indoctrination test under the Free Exercise Clause, much less in the public school context. The closest

it has come is Barnette, a free speech case that implicated free exercise interests and which Smith included in its hybrid case discussion. In Barnette, the Court held that the state could not coerce acquiescence through compelled statements of belief, such as the mandatory recital of the pledge of allegiance in public schools. 319 U.S. at 634, 642, 63 S.Ct. 1178. It did not hold that the state could not attempt to inculcate values by instruction, and in fact carefully distinguished the two approaches. Id. at 631, 640, 63 S.Ct. 1178; see also Stewart, supra, at 74. We do not address whether or not an indoctrination theory under the Free Exercise Clause is sound. Plaintiffs' pleadings do not establish a viable case of indoctrination, even assuming that extreme indoctrination can be a form of coercion.

First, as to the parents' free exercise rights, the mere fact that a child is exposed on occasion in public school to a concept offensive to a parent's religious belief does not inhibit the parent from instructing the child differently. A parent whose "child is exposed to sensitive topics or information [at school] remains free to discuss these matters and to place them in the family's moral or religious context, or to supplement the information with more appropriate materials." C.N., 430 F.3d at 185; see also Newdow, 542 U.S. at 16, 124 S.Ct. 2301 (noting that the school's requirement that Newdow's daughter recite the pledge of allegiance every day did not "impair[ ] Newdow's right to instruct his daughter in his religious views"). The parents here did in fact have notice, if not prior notice, of the books and of the school's overall intent to promote toleration of same-sex marriage, and they retained their ability to discuss the

material and subject matter with their children. Our outcome does not turn, however, on whether the parents had notice.

Turning to the children's free exercise rights, we cannot see how Jacob's free exercise right was burdened at all: two books were made available to him, but he was never required to read them or have them read to him. Further, these books do not endorse gay marriage or homosexuality, or even address these topics explicitly, but merely describe how other children might come from families that look different from one's own. There is no free exercise right to be free from any reference in public elementary schools to the existence of families in which the parents are of different gender combinations.

Joey has a more significant claim, both because he was required to sit through a classroom reading of King and King and because that book affirmatively endorses homosexuality and gay marriage. It is a fair inference that the reading of King and King was precisely intended to influence the listening children toward tolerance of gay marriage. That was the point of why that book was chosen and used. Even assuming there is a continuum along which an intent to influence could become an attempt to indoctrinate, however, this case is firmly on the influence-toward-tolerance end. There is no evidence of systemic indoctrination. There is no allegation that Joey was asked to affirm gay marriage. Requiring a student to read a particular book is generally not coercive of free exercise rights.

Public schools are not obliged to shield individual students from ideas which potentially are religiously offensive, particularly when the

school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them. See Fleischfresser, 15 F.3d at 690; Mozert, 827 F.2d at 1063-65, 1070; see also Bauchman, 132 F.3d at 558 ("[P]ublic schools are not required to delete from the curriculum all materials that may offend any religious sensibility." (quoting Florey v. Sioux Falls Sch. Dist. 49-5, 619 F.2d 1311, 1318 (8th Cir.1980)) (internal quotation marks omitted)). The reading of King and King was not instruction in religion or religious beliefs.[21] Cf. Barnette, 319 U.S. at 631, 63 S.Ct. 1178 (distinguishing between compelling students to declare a belief through mandatory recital of the pledge of allegiance, which violates free exercise, and "merely ... acquaint[ing students] with the flag salute so that they may be informed as to what it is or even what it means").

On the facts, there is no viable claim of "indoctrination" here. Without suggesting that such showings would suffice to establish a claim of indoctrination, we note the plaintiffs' children were not forced to read the books on pain of suspension. Nor were they subject to a constant stream of like materials. There is no allegation here of a formalized curriculum requiring students to read many books affirming gay marriage. Cf. Mozert, 827 F.2d at 1079 (Boggs, J., concurring) (concluding that such facts could constitute a burden on free

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[21] Indeed, in Schempp the Court suggested that even if a series of mandatory classroom Bible readings violated the Free Exercise Clause, the study of the Bible or religion, if "presented objectively as part of a secular program of education, may [ ] be effected consistently with the First Amendment." 374 U.S. at 225, 83 S.Ct. 1560.

exercise, although such a burden would be constitutionally permissible in the public school context if parents still retained other educational options). The reading by a teacher of one book, or even three, and even if to a young and impressionable child, does not constitute "indoctrination."

Because plaintiffs do not allege facts that give rise to claims of constitutional magnitude, the district court did not err in granting defendants' motion to dismiss the claims under the U.S. Constitution.

III.

Public schools often walk a tightrope between the many competing constitutional demands made by parents, students, teachers, and the schools' other constituents. Cf. Morse v. Frederick, --- U.S. ---, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) (students' First Amendment free speech rights versus interest in administering schools without encouragement of illegal drug use); Hennessy v. City of Melrose, 194 F.3d 237 (1st Cir.1999) (public school's interest in implementing its curriculum versus student teacher's interest in expressing opposition to abortion and homosexuality); Zykan ex rel. Zykan v. Warsaw Cmty. Sch. Corp., 631 F.2d 1300, 1304 (7th Cir.1980) (students' First Amendment "freedom to hear" under Va. State Pharmacy Bd. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), versus school's interest in limiting exposure to materials that might harm intellectual and social development); see also Lyng, 485 U.S. at 452, 108 S.Ct. 1319 ("The Constitution does not, and

courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours."). The balance the school struck here does not offend the Free Exercise or Due Process Clauses of the U.S. Constitution.

We do not suggest that the school's choice of books for young students has not deeply offended the plaintiffs' sincerely held religious beliefs. If the school system has been insufficiently sensitive to such religious beliefs, the plaintiffs may seek recourse to the normal political processes for change in the town and state. See Smith, 494 U.S. at 890, 110 S.Ct. 1595. They are not entitled to a federal judicial remedy under the U.S. Constitution.

We affirm the district court's dismissal with prejudice of plaintiffs' federal claims and its dismissal without prejudice of the state claims so that they may be reinstated, should plaintiffs choose, in state court.

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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| David PARKER, et al., Plaintiffs, | ) |
| v. | ) C.A. No. 06-10751-MLW |
| William HURLEY, et al., Defendants. | ) |

MEMORANDUM AND ORDER

Wolf, D.J. February 23, 2007

I. SUMMARY

Plaintiffs David and Tonia Parker, and Robert and Robin Wirthlin, brought this action in 2006, individually and on behalf of their respective minor children, Jacob and Joshua Parker, and Joseph Wirthlin, Jr. ("Joey"). They are suing various employees of the Lexington, Massachusetts public schools and members of the Lexington School Committee in both their individual and official capacities.[1]

[1] The plaintiffs charge the following defendants in both their individual and official capacities: the Superintendents of the Town of Lexington Public Schools, William Hurley and Paul B. Ash, Ph.D.; the members of the Town of Lexington School Committee Helen L. Cohen, Thomas R. Diaz, Olga Guttag, Scott Burson, and Thomas Griffith; the director of education in the Town of Lexington, Andre Ravenelle; the principal of the Estabrook Elementary School, Joni Jay; the coordinator of Health Education, Jennifer Wolfrum; and a teacher of the

Massachusetts law prohibits discrimination in public schools based on sex or sexual orientation. It also requires that public school curricula encourage respect for all individuals regardless of, among other things, sexual orientation. Pursuant to these directives, the Massachusetts Department of Education has issued standards which encourage instruction for pre-kindergarten through fifth grade students concerning different types of people and families.

Jacob Parker and Joey Wirthlin are students in a Lexington elementary school. When he was in kindergarten, Jacob was given a book that depicts various forms of families, including one that includes parents of the same gender. When he was in first grade, Joey was read a book about a prince who married another prince. Both books were part of the Lexington school system's effort to educate its students to understand and respect gays, lesbians, and the families they sometimes form in Massachusetts, which recognizes same-sex marriage.

Jacob and Joey's parents each have sincerely held religious beliefs that homosexuality is immoral and that marriage is necessarily only a holy union between a man and a woman. They do not wish to have their young children exposed to views that contradict these beliefs and their teaching of them. The Parkers and Wirthlins allege that the defendants are attempting to "indoctrinate" their children with the belief that homosexuality and same-sex marriages are moral,

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Estabrook Elementary School, Heather Kramer. In addition, the plaintiffs name as a defendant the Town of Lexington.

and to "denigrate" the contrary view that they wish to instill in their children.

The Parkers and Wirthlins assert that the defendants' conduct violates their rights under the United States Constitution to raise their children and to the free exercise of their religion. They also contend that the defendants have violated the laws of the Commonwealth of Massachusetts, including the statute that requires that parents be given notice and an opportunity to exempt their children from any curriculum that "primarily involves human sexual education or human sexuality issues." M.G.L. c. 71, § 32A.

The defendants have moved to dismiss this case. As explained in detail in this Memorandum, plaintiffs have not alleged facts which constitute a violation of the Constitution or any law of the United States. Therefore, their federal claims are being dismissed with prejudice. Plaintiffs' state law claims are also being dismissed, but without prejudice to their being reinstituted in the courts of the Commonwealth of Massachusetts.

In summary, the court must dismiss plaintiffs' federal claims because this case is not distinguishable in any material respect from Brown v. Hot, Sexy and Safer Productions, 68 F.3d 525 (1st Cir.1995). In Brown, the First Circuit held that the constitutional right of parents to raise their children does not include the right to restrict what a public school may teach their children and that teachings which contradict a parent's religious beliefs do not violate their First Amendment right to exercise their religion. Id. at 534, 539. The reasoning and holding of Brown have been reaffirmed by the First Circuit, have been found to be persuasive by many other Courts of Appeals in

comparable cases, and have not been undermined by any decision of the Supreme Court. Therefore, Brown constitutes binding precedent which dictates the decision to dismiss plaintiffs' federal claims in this case.

In essence, under the Constitution public schools are entitled to teach anything that is reasonably related to the goals of preparing students to become engaged and productive citizens in our democracy. Diversity is a hallmark of our nation. It is increasingly evident that our diversity includes differences in sexual orientation. Our nation's history includes a fundamental commitment to promoting mutual respect among citizens in our diverse nation that is manifest in the First Amendment's prohibitions on establishing an official religion and restricting the free exercise of religious beliefs on which plaintiffs base some of their federal claims. Our history also includes instances of individual and official discrimination against gays and lesbians, among others. It is reasonable for public educators to teach elementary school students about individuals with different sexual orientations and about various forms of families, including those with same-sex parents, in an effort to eradicate the effects of past discrimination, to reduce the risk of future discrimination and, in the process, to reaffirm our nation's constitutional commitment to promoting mutual respect among members of our diverse society. In addition, it is reasonable for those educators to find that teaching young children to understand and respect differences in sexual orientation will contribute to an academic environment in which students who are gay,

lesbian, or the children of same-sex parents will be comfortable and, therefore, better able to learn.

When, as here, federal claims are dismissed at the outset of a case, the related state law claims should usually be dismissed as well, without prejudice to their being pursued in state court. It is particularly appropriate that the state law claims in this case now be dismissed.

As indicated earlier, those claims include plaintiffs' contention that the defendants have violated the Massachusetts statute which requires that parents be given notice and an opportunity to exempt their children from any curriculum that "primarily involves human sexual education or human sexuality." M.G.L. c. 71, § 32A. The defendants contend that the statute does not provide private individuals the power to sue to enforce it. They also argue that the conduct in question in this case is not covered by the statute. The courts of the Commonwealth of Massachusetts have not decided these issues. It is most appropriate to allow those courts to decide authoritatively the meaning of the Massachusetts statute.

Therefore, all of plaintiffs' claims are being dismissed. However, the limits of what is now being decided should be recognized.

Parents do have a fundamental right to raise their children. They are not required to abandon that responsibility to the state. The Parkers and Wirthlins may send their children to a private school that does not seek to foster understandings of homosexuality or same-sex marriage that conflict with their religious beliefs. They may also educate their children at home. In addition, the plaintiffs may attempt to persuade others to join them in

electing a Lexington School Committee that will implement a curriculum that is more compatible with their beliefs. However, the Parkers and Wirthlins have chosen to send their children to the Lexington public schools with its current curriculum. The Constitution does not permit them to prescribe what those children will be taught.

It should also be recognized that while the Constitution does not compel the defendants to revise the Lexington elementary school curriculum, or to permit the Parkers and Wirthlins to exempt their children from teaching about homosexuality or same-sex marriage, it also does not prohibit the defendants from voluntarily accommodating the parents' concerns if there is a reasonable way to do so. Finding a reasonable accommodation may be a challenging task. Allowing parents to exempt their children from classes primarily involving human sexual education may not injure the value of those classes for the students who remain. However, as Ralph Waldo Emerson wrote in his journal, " 'I pay the school master', but 'tis the school boys that educate my son.' " James O. Freedman, Idealism and Liberal Education 63 (1999). An exodus from class when issues of homosexuality or same-sex marriage are to be discussed could send the message that gays, lesbians, and the children of same-sex parents are inferior and, therefore, have a damaging effect on those students. Cf. Brown v. Board of Education, 347 U.S. 483, 494, 74 S.Ct. 686, 98 L.Ed. 873 (1954).[2] It might also undermine

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[2] The Supreme Court wrote in Brown, 347 U.S. at 494, 74 S.Ct. 686:Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law, for the policy of separating the races is usually interpreted as

the defendants' efforts to educate the remaining other students to understand and respect differences in sexual orientation.

## II. FACTS

The following facts are alleged in the complaint, derived from documents central to plaintiffs' allegations or specifically referenced in the complaint, or describe established laws and policies of the Commonwealth of Massachusetts as reflected in its official records. See Watterson v. Page, 987 F.2d 1, 3 (1st Cir.1993); Beddall v. State Street Bank and Trust Co., 137 F.3d 12, 16-17 (1st Cir.1998).

Since at least 1993, Massachusetts has by statute required that public schools not discriminate based on sex or sexual orientation. See M.G.L. c. 76, § 5. Moreover, Massachusetts law has since 1993 required that the Board of Education and the Commissioner of Education develop standards for curricula for all public elementary and secondary schools "to inculcate respect for the

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denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn.

Nevertheless, it is evident to the court that this dispute involves parents who are passionately devoted to their children, many people who support them, and committed educators and their many supporters as well. Profound differences in religious beliefs are also a hallmark of our diverse nation. It is often in a community's interest to try to find a reasonable way to accommodate those differences. Litigation of the remaining state law claims in state court will result in a judicial decision of the issues presented. It is not likely to end the intense disagreement between the parties or the divisive impact of it on their community. Therefore, the parties may wish to attempt to mediate their dispute before resuming their legal battle in state court.

cultural, ethnic and racial diversity of the commonwealth ... and to avoid perpetuating gender, cultural, ethnic or racial stereotypes." M.G.L. c. 69, § 1D.

Accordingly, the Massachusetts Department of Education promulgated regulations which require that "[a]ll public school systems shall, through their curricula, encourage respect for the human and civil rights of all individuals regardless of race, color, sex, religion, national origin or sexual orientation." 603 C.M.R. § 26.06(1). Pursuant to these directives, the Commissioner of the Department of Education issued curricula frameworks for pre-kindergarten through fifth grade that encourage instruction that describes "different types of families" and "the concepts of prejudice and discrimination." Massachusetts Comprehensive Health Curriculum Framework (1999) at 30, 33. These lessons are intended to contribute to the creation of "a safe and supportive environment where individual similarities and differences are acknowledged." Id. at 5.

In 2003, the Supreme Judicial Court of Massachusetts held that the state's ban on same-sex marriages violated the Commonwealth's constitution. See Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003). This decision was based, in part, on the finding that the "ban work [ed] a deep and scarring hardship on a very real segment of the community for no rational reason." Id. at 341, 798 N.E.2d 941.

Jacob Parker is a student in the Lexington, Massachusetts Estabrook Elementary School. In 2005, when he was a six year-old kindergarten student, Jacob brought home from school the book Who's in a Family as part of a Diversity Book Bag

program. The Lexington school system uses the Diversity Book Bag program to strengthen the connections among its schoolchildren, and to build an atmosphere of tolerance and respect for different cultures, races, and family structures. Who's in a Family includes illustrations of different forms of families, including children with parents of different genders, children with parents of the same gender, children with parents of different races, and a single parent family. In 2006, this book was in Jacob's first grade reading center. Molly's Family was also in that reading center. Molly's Family teaches about different kinds of families, focusing on a student whose parents are a same-sex couple.

Joey Wirthlin also attends the Estabrook Elementary School. In 2006, when he was seven years-old, his first grade teacher read King and King aloud to his class. King and King is a fairytale about a prince ordered by his mother, the queen, to find a princess to marry. The prince rejects each of the princesses he meets. Ultimately, the prince meets another prince. The two fall in love, marry, and live happily ever after. The book concludes with a cartoon kiss between the young couple.

David and Tonia Parker are Jacob's parents. Joseph and Robin Wirthlin are Joey's parents. The Parkers and Wirthlins have sincerely held religious beliefs that homosexuality is immoral and that marriage necessarily means a holy union between a man and a woman. They do not wish to have their young children exposed to views that contradict these beliefs. The Parkers and Wirthlins contend that the defendants used Who's in a Family and King and King to "indoctrinate" their young children with the beliefs that homosexuality and

same-sex marriages are moral and acceptable, and that the Parkers' and Wirthlins' beliefs and teachings to the contrary are incorrect. Plaintiffs also assert that the defendants acted intentionally to "denigrate" their sincere and deeply held religious beliefs.

The Parkers and Wirthlins informed the defendants that the books and lessons in dispute are contrary to their religious beliefs, and asserted that the use of those books violated their parental rights to raise their children. They requested that the Lexington schools not expose Jacob, his younger brother Josh Parker, or Joey to any material or discussion concerning homosexuality or same-sex unions without providing notification to their respective parents and an opportunity for the parents to opt out of those lessons on behalf of their children.

Pursuant to M.G.L. c. 71, § 32A, Lexington has a policy which allows students to opt out of curriculum that "primarily involves human sexual education or human sexuality issues." However, the defendants did not construe this policy to require offering this option to teaching concerning homosexuality or same-sex marriages. Asserting that the Parkers' and Wirthlins' requests were not practical, the defendants denied them.

The Superintendent of Schools for Lexington, defendant Paul Ash, explained this decision in several public statements. The plaintiffs assert that these statements were inaccurate and intentionally demeaning to them.

In 2006, the Parkers and the Wirthlins filed this suit individually and on behalf of their children. They allege violations of both federal and state law. More specifically, the plaintiffs assert that their

federal constitutional rights to privacy, to raise their children, and to the free exercise of their religion are being violated by the defendants individually and in conspiracy with each other. They also contend that defendants' conduct violates the Massachusetts Civil Rights Act, M.G.L. c. 12, § 11, and the statute which requires that parents be given notice and an opportunity to exempt their children from curriculum which "primarily involves human sexual education or human sexuality issues," M.G.L. c. 71, § 32A.

Plaintiffs seek compensatory damages and punitive damages. They also request injunctive relief that would require the defendants to: notify the plaintiff parents of any adult initiated classroom discussion of sexuality, gender identity, or forms of marriage until their children are in the seventh grade; allow the plaintiff parents to exempt their children from any such discussion; permit the plaintiff parents to observe silently and record any such discussion; and prohibit "materials graphically depicting homosexual physical contact," evidently including King and King, from being submitted to the students until seventh grade. Complaint at 23.

Defendants moved to dismiss this case, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim on which relief may be granted. With the agreement of the plaintiffs, the court received a brief in support of the motion to dismiss from several amici curiae. Plaintiffs opposed the motion to dismiss. A hearing was held on February 7, 2007.

## III. ANALYSIS

### A. The Applicable Standard

In considering a motion to dismiss under Rule 12(b)(6) a court "must take the allegations of the complaint as true and must make all reasonable inferences in favor of the plaintiffs." Watterson v. Page, 987 F.2d 1, 3 (1st Cir.1993). " 'A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " Miranda v. Ponce Fed'l Bank, 948 F.2d 41, 44 (1st Cir.1991) ( quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

This "highly deferential" standard of review "does not mean, however, that a court must (or should) accept every allegation made by the complainant, no matter how conclusory or generalized." United States v. AVX Corp., 962 F.2d 108, 115 (1st Cir.1992). Rather, a court should "eschew any reliance on bald assertions, unsupportable conclusions, and 'opprobrious epithets.' " Chongris v. Board of Appeals of Town of Andover, 811 F.2d 36, 37 (1st Cir.1987) ( quoting Snowden v. Hughes, 321 U.S. 1, 10, 64 S.Ct. 397, 88 L.Ed. 497 (1944)).

### B. The Federal Claims Must Be Dismissed With Prejudice

The defendants assert that even accepting the allegations in the complaint as true, the plaintiffs have failed to state a violation of their federal constitutional rights. They also contend that, at a minimum, the individual defendants have qualified

immunity with regard to the claims against them and, therefore, cannot be held personally liable to plaintiffs.

"Before reaching the issue of qualified immunity the court must ascertain whether the plaintiffs have asserted a violation of a constitutional right at all." Brown, 68 F.3d at 531; see also Watterson, 987 F.2d at 7; Singer v. Maine, 49 F.3d 837, 844 (1st Cir.1995). As indicated earlier and described below, even if proven, the allegations in the complaint would not establish a violation of plaintiffs' federal constitutional rights. Therefore, defendants' motion to dismiss the federal claims is meritorious.

It is axiomatic that "[u]ntil a court of appeals revokes a binding precedent, a district court within the circuit is hard put to ignore that precedent unless it has unmistakably been cast into disrepute by supervening authority. See Sarzen v. Gaughan, 489 F.2d 1076, 1082 (1st Cir.1973) (explaining that stare decisis requires lower courts to take binding precedents 'at face value until formally altered.')." Eulitt v. Maine Department of Education, 386 F.3d 344, 349 (1st Cir.2004). The instant case is in all material respects analogous to Brown, supra, in which the First Circuit affirmed the dismissal of plaintiffs' federal claims. The reasoning of Brown has not been cast into question by either subsequent decisions of the First Circuit or the Supreme Court. Therefore, this court must follow Brown and dismiss the federal claims in this case.

1. The Privacy and Substantive Due Process Claim

In Brown, 68 F.3d at 529, two fifteen year-old high school students were required to attend a program to teach AIDS awareness. Although school policy contemplated obtaining prior parental

permission to attend, those students' parents "were not given advance notice of the content of the Program or an opportunity to excuse their children from attendance at the assembly." Id. at 530. See also id. at 535 ("the parents were not given advance notice of the contents of the Program or an opportunity to opt out.").

In Brown, the First Circuit recognized that the "Fourteenth Amendment provides that '[n]o state shall ... deprive any person of life, liberty, or property without due process of law'. U.S. Const. amend. XIV." Id. at 531. The First Circuit explained that a plaintiff can assert a viable substantive due process claim by alleging a "deprivation of an identified liberty or property interest protected by the Fourteenth Amendment." Id.

In Brown, the plaintiff parents alleged that their right to substantive due process was infringed because "the defendants violated their privacy right to direct the upbringing of their children and educate them in accord with their own views." Id. at 532. The Parkers and the Wirthlins make the same claim in this case, asserting that "the defendants intruded upon and impaired the adult plaintiffs' clearly established substantive Due Process rights under the Fifth and Fourteenth Amendments, as parents and guardians to direct the moral upbringing of their children and the clearly established rights of the minor children to such upbringing." Complaint, ¶ 71.

In Brown, the First Circuit assumed for the purpose of its analysis that "the right to rear one's children is fundamental." 68 F.3d at 533. Interpreting and applying the Supreme Court precedents of Meyer v. Nebraska, 262 U.S. 390, 43

S.Ct. 625, 67 L.Ed. 1042 (1923) and Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), the First Circuit wrote that:

> The Meyer and Pierce cases, we think, evince the principle that the state cannot prevent parents from choosing a specific educational program-whether it be religious instruction at a private school or instruction in a foreign language. That is, the state does not have the power to standardize its children or "foster a homogenous people" by completely foreclosing the opportunity of individuals and groups to choose a different path of education. Meyer, 262 U.S. at 402, 43 S.Ct. at 627-28, discussed in, [Laurence H. Tribe, American Constitutional Law, § 15-6 at 1319-20 (1988) ]. We do not think, however, that this freedom encompasses a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children. See [Rotunda & Nowak, Treatise on Constitutional Law: Substance and Procedure, (2d ed.1992) ]. We think it is fundamentally different for the state to say to a parent, "You can't teach your child German or send him to a parochial school," than for the parent to say to the state, "You can't teach my child subjects that are morally offensive to me." The first instance involves the state proscribing parents from educating their children, while the second involves parents prescribing what the state shall teach their children. If all parents had a fundamental constitutional right to dictate individually what the schools teach their

> children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by Meyer and Pierce do not encompass a broad-based right to restrict the flow of information in the public schools.

Id. at 533-34, 45 S.Ct. 571. Therefore, the First Circuit found that plaintiffs' substantive due process claim had been properly dismissed.

The First Circuit's reasoning and decision in Brown requires dismissal of the substantive due process claim in the instant case as well. The holding that parents do not have a constitutionally protected liberty interest that permits them to prescribe what the state may teach their children has not been "cast into disrepute by supervening authority." Eulitt, 386 F.3d at 349. To the contrary, in 2004 the First Circuit reiterated that while parents have a general liberty interest that permits them to direct the upbringing and education of their children, "this constitutional right is limited in scope." Pisacane v. Desjardins, 115 Fed.Appx. 446, 450 (1st Cir. Oct.18, 2004). Pisacane involved a school's alleged "refusal to let [a parent] dictate to the school about [a] science text book." Id. In affirming the granting of the defendants' motion for summary judgment, the First Circuit wrote concerning a parent's right to raise his children:

In Brown we ruled that the right embraces the principle that the state cannot prevent parents from choosing for their child a specific education

program but did not include the right to dictate the curriculum at the public school to which parents have chosen to send their children. 68 F.3d at 533-34.

* * * * * *

The appellees asserted refusal to let Pisacane dictate to the school about the science book ... would not violate the parental due process right. As said, the right does not include parental control over a public school's curriculum Brown, 68 F.3d at 533-34.

Id.

Brown not only remains the law of the First Circuit, it has also been found to be persuasive in every other circuit that has discussed it in defining the scope of a parent's right to raise his or her children. See Leebaert v. Harrington, 332 F.3d 134, 141 (2d Cir.2003) (upholding refusal to exempt student from mandatory health education course and stating, "we agree [with Brown ] that Meyer, Pierce, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught"); C.N. v. Ridgewood Board of Education, 430 F.3d 159, 182 (3rd Cir.2005) (affirming finding that administration of a questionnaire to students did not violate parents' liberty interest and noting that Brown, among other decisions, "held that in certain circumstances the parental right to control the upbringing of a child must give way to a school's ability to control curriculum"); Littlefield v. Forney, 268 F.3d 275, 291 (5th Cir.2001) ( citing Brown in support of the

holding that "[w]hile Parents may have a fundamental right in the upbringing and education of their children, this right does not cover the Parents' objection to the school uniform policy"); Blau v. Fort Thomas Public School District, 401 F.3d 381, 395-96 (6th Cir.2005) ( citing Brown in holding that parent does not have a right to exempt his child from a school dress code); Swanson v. Guthrie Independent School District No. I-L., 135 F.3d 694, 700 (10th Cir.1998) ( citing Brown in holding that a school's refusal to allow a student to attend classes part-time presented "no colorable claim of infringement on the constitutional right to direct a child's education"); see also Herndon v. Chapel Hill-Carrboro City Board of Education, 89 F.3d 174, 176 (4th Cir.1996) (holding, without citing Brown, that requiring high school students to perform public service does not violate parents' right to control the education of their children).

Contrary to plaintiffs' contention, the Supreme Court's decision in Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), does not undermine the authority of Brown. In Troxel, the plurality stated that Meyers and Pierce established that there is a fundamental liberty "interest of parents in the care, custody, and control of their children." 530 U.S. at 65, 120 S.Ct. 2054. It then held that as applied to the facts of Troxel, a state statute allowing a court to grant visitation rights to any person violated that fundamental right. Id. at 73, 120 S.Ct. 2054.

In Troxel, the plurality identified a fundamental liberty interest of "parents, but left the scope of that right undefined." Leebaert, 332 F.3d at 142. The Second Circuit explained that while the plurality in Troxel discussed Meyer and Pierce:

> [T]here is nothing in Troxel that would lead us to conclude from the Court's recognition of a parental right in what the plurality called "the care, custody, and control" of a child with respect to visitation rights that parents have a fundamental right to the upbringing and education of the child that includes the right to tell public schools what to teach or what not to teach him or her.

Id. See also Littlefield, 268 F.3d at 291 (" Troxel does not change [our] reasoning in the context of parental rights concerning public education.").

In Brown the First Circuit essentially anticipated Troxel. The First Circuit wrote in Brown that "[w]e need not decide here whether the right to rear one's children is fundamental because we find that, even if it were, the plaintiffs have failed to demonstrate an intrusion of constitutional magnitude." 68 F.3d at 533. After thus assuming, without finding, that the right to raise one's children is fundamental, the First Circuit held that this right does not "encompass [ ] a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children." Id. In view of the foregoing, this court concludes that Troxel has not unmistakably undermined the authority of Brown. See Eulitt, 386 F.3d at 349. Therefore, Brown remains precedent that establishes the law which this court must apply in this case.

Plaintiffs' efforts to distinguish Brown factually are also not persuasive. Plaintiffs assert that "it appears that the parents in Brown were in fact given some sort of prior notice and an opt out option." Plaintiffs' Memorandum in Opposition to

Amicus Brief at 7. This contention is based on a misreading of Brown. In Brown, the First Circuit noted that the School Committee's policy provided for notice and an opportunity for parents to exempt their children from the presentation on human sexuality. 68 F.3d at 530. It twice expressly stated, however, that the required notice and opportunity to opt out were not given. Id. at 530, 534.

Nor does the young age of the students in the instant case distinguish Brown. In the different context of deciding whether government conduct violates the Establishment Clause of the First Amendment by sending a message that the government is endorsing religion, the Supreme Court has found both the school setting and the young age of the children to be relevant. As the Seventh Circuit has summarized it:

> [A]lleged Establishment Clause violations in grade-school settings present heightened concerns for courts. These concerns were voiced in School District of Grand Rapids v. Ball, 473 U.S. 373, 390, 105 S.Ct. 3216, 3226, 87 L.Ed.2d 267 (1985): "The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice." This concern for the age of the audience is of particular importance when the setting for the alleged violation is a public school. In this setting, "[t]he State exerts great authority and coercive power through mandatory attendance requirements, and because of students' emulation of teachers as role models and the

children's susceptibility to peer pressure." Edwards v. Aguillard, 482 U.S. 578, 584, 107 S.Ct. 2573, 2578, 96 L.Ed.2d 510 (1987).

Sherman v. Community Consolidated School District 21 of Wheeling Township, 8 F.3d 1160, 1163 (7th Cir.1993). See also Spacco v. Bridgewater School Department, 722 F.Supp. 834, 841 (D.Mass.1989) (Wolf, J.) (plaintiffs made a strong showing that holding public elementary school classes in a church violates the Establishment Clause in part because "many of those affected ... are impressionable, young children."). However, plaintiffs have repeatedly confirmed that they are not asserting an Establishment Clause claim in this case.

The reason for the constitutional concern regarding young school children for Establishment Clause purposes does not apply to plaintiffs' substantive due process and Free Exercise Clause claims in this case. The Establishment Clause prohibits government conduct that has the effect of endorsing religion. See County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 592, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). However, the very purpose of schools is the " 'preparation of individuals for participation as citizens' [and, therefore,] local education officials may attempt 'to promote civic virtues' ... 'that awake[n] the child to cultural values.' " Board of Education v. Pico, 457 U.S. 853, 876, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982) (Blackmun, J., concurring) ( quoting Ambach v. Norwick, 441 U.S. 68, 80, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979), and Brown v. Board of Education, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954)).

Schools are expected to transmit civic values. See Plyler v. Doe, 457 U.S. 202, 221, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); Ambach, 441 U.S. at 76, 99 S.Ct. 1589. In essence, the Supreme Court has made clear that while the state may not expressly or indirectly endorse a particular religion or suggest that religious beliefs are officially preferred over other beliefs, the state is expected to teach civic values as part of its preparation of students for citizenship.

Neither the Supreme Court nor the First Circuit have suggested that parents have constitutional rights concerning public elementary school students that are different or greater than their rights concerning older students. Rather, in Runyon v. McCrary, 427 U.S. 160, 165, 177, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), the Supreme Court held that prohibiting racial discrimination in admissions to private nursery schools, among others, did not violate parents' rights to direct the upbringing and education of their children. In Brown, the First Circuit did not write anything that suggests that it would have found a parental right to restrict what could be taught to elementary school students when it held that parents had no such right with regard to high school students. See 68 F.3d at 532-34.

In Fields, the Ninth Circuit held that the rights of parents were not infringed by the distribution of a survey containing questions about sex to elementary school students. The Ninth Circuit relied on Brown in reaching its conclusion, writing:

> We agree with and adopt the First Circuit's analysis. Meyer, Pierce, and their progeny "evince the principle that the state cannot prevent parents from choosing a specific

> educational program," but they do not afford parents a right to compel public schools to follow their own idiosyncratic views as to what information the schools may dispense. Parents have a right to inform their children when and as they wish on the subject of sex; they have no constitutional right, however, to prevent a public school from providing its students with whatever information it wishes to provide, sexual or otherwise, when and as the school determines that it is appropriate to do so.

427 F.3d at 1205-06. See also Littlefield, 268 F.3d at 279, 290 (relying on Brown in finding that district-wide, mandatory uniform policy, evidently covering elementary school students, did not violate parental rights).

In C.N., the Third Circuit relied in part on Brown in finding in connection with a motion for summary judgment that the use of a questionnaire seeking details of middle and high school students' personal lives did not violate their parents' rights to direct their upbringing. 430 F.3d at 182-83, 185. As plaintiffs here emphasize, in doing so the Third Circuit wrote:

> [W]hile it is true that parents, not schools, have the primary responsibility "to inculcate moral standards, religious beliefs, and elements of good citizenship," [ Gruenke v. Seip, 225 F.3d 290, 307 (3d Cir.2000) ], a myriad of influences surround middle and high school students everyday, many of which are beyond the strict control of the parent or even abhorrent to the parent. We recognize that introducing a child to

> sensitive topics before a parent might have done so herself can complicate and even undermine parental authority, but conclude that the survey in this case did not intrude on parental decision-making authority in the same sense as occurred in Gruenke. A parent whose middle or high school age child is exposed to sensitive topics or information in a survey remains free to discuss these matters and to place them in the family's moral or religious context, or to supplement the information with more appropriate materials. School Defendants in no way indoctrinated the students in any particular outlook on these sensitive topics; at most, they may have introduced a few topics unknown to certain individuals. We thus conclude that the survey's interference with parental decision-making authority did not amount to a constitutional violation.

Id. at 185 (emphasis added). In reaching this conclusion, the Third Circuit noted that it was not holding, "as did the panel in Fields v. Palmdale School District, 427 F.3d 1197 (9th Cir.2005), that the right of parents under the Meyer-Pierce rubric does not extend beyond the threshold of the school door.' " Id. at n. 26.

The Third Circuit's rejection of what is characterized as the "categorical approach" of Fields, id., and its repeated references to the children as middle or high school students suggest that it has left open the possibility that the age of the students at issue might in some case make a difference. However, this suggestion does not persuade this court either that the instant case is

factually different than Brown in any material respect or that Brown has "unmistakably been cast into disrepute by supervening authority." Eulitt, 386 F.3d at 349.

This conclusion is not qualified by the fact that in C.N., the Third Circuit stated that the students were not being "indoctrinated" and in the instant case plaintiffs allege that their children are being "indoctrinated." As explained earlier, in deciding a motion to dismiss, a court must not rely on, among other things, " 'opprobrious epithets.' " Chongris, 811 F.2d at 37 ( quoting Snowden, 321 U.S. at 10, 64 S.Ct. 397). "Indoctrination" is a pejorative term for "teaching." Among other things, "indoctrination" is defined as "to teach to accept a system of thought uncritically." Websters New Riverside Dictionary (1984 ed) at 624. It is, obviously, the duty of schools to teach. The complaint, even when read in the light most favorable to plaintiffs, indicates that "[a] parent whose ... child is exposed to sensitive topics or information ... remains free to discuss these matters and place them in the family's moral or religious context ..." C.N., 430 F.3d at 185.[3]Therefore, the characterization of the use of the books at issue as "indoctrination" does not distinguish the instant case from Brown.[4]

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[3] Although not material to the analysis of the motion to dismiss, the court notes that the devoted plaintiff parents in this case have demonstrated their capacity to inform their children of views that contradict those to which the students are being introduced at school.

[4] At the February 7, 2007 hearing the parties submitted the books at issue, which may be considered in deciding the motion to dismiss because they are central to the complaint. See Watterson, 987 F.2d at 3; Beddall, 137 F.3d at 16-17. The court has reviewed them. Who's in a Family and Molly's

In view of the foregoing, Brown's holding that parents do not have a fundamental liberty interest that permits them to prescribe the curriculum for their children means that the defendants' use of the books at issue and related teaching is constitutionally permissible if there is a rational basis for the instruction. See Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 461 (2d Cir.1996) (rational basis review for secular objections); Leebaert, 332 F.3d at 142-143 (extending Immediato to cases in which plaintiff's objections are religiously motivated); Herndon, 89 F.3d at 179 (explaining that under Runyon, curricular choices are subject to reasonable regulation); Littlefield, 268 F.3d at 291 (same); Blau, 401 F.3d at 393, 396 (all governmental action that does not impinge on fundamental rights is subject to rational basis review); Fields, 427 F.3d at 1208 ("government actions that do not affect fundamental rights or liberty interests and do not involve suspect classifications will be upheld if it they are rationally related to a legitimate state interest"); Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 703 (10th Cir.1998) (with regard to a neutral rule of general applicability defendants must prove only a reasonable relationship to a legitimate purpose).

"In cases involving rationality review, a court must apply substantially the same analysis to both substantive due process and equal protection

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Family each describe many different types of families and do not suggest the superiority of any paradigm, let alone families headed by members of the same-sex. The premise of King and King is that men usually marry women, but that some men are happier marrying another man.

challenges." Eastern Enterprises v. Chater, 110 F.3d 150, 159 (1st Cir.1997) overturned on other grounds at Eastern Enterprises v. Apfel, 524 U.S. 498, 537, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998). Rational basis review requires that government action correlate to a legitimate governmental interest. See PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28, 31-32 (1st Cir.1991). The fit between means and ends need not be tight-it need only be "plausible." FCC v. Beach Communications, 508 U.S. 307, 313-314, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). Moreover, the constitution demands only that the legitimate governmental purpose be conceivable, not actual. Id. at 315, 113 S.Ct. 2096. In essence, rational basis review "is a paradigm of judicial restraint." Id. at 313-314, 113 S.Ct. 2096 (1993).

Plaintiffs argue that defendants' alleged conduct violates their fundamental liberty interest in raising their children and, therefore, heightened scrutiny is required concerning the constitutionality of that conduct. They have not asserted that there is not a rational basis for the defendants' decisions about what to teach.

In any event, such a rational basis exists. "[A]s Thomas Jefferson pointed out early in our history ... education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." Wisconsin v. Yoder, 406 U.S. 205, 221, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). As indicated earlier, the Supreme Court has recognized " 'the public schools as a most vital civic institution for the preservation of a democratic system of government,' School District of Abington v. Schempp, 374 U.S. 203, 230, 83 S.Ct. 1560, 10

L.Ed.2d 844 (1963) (Brennan, J., concurring), and as the primary vehicle for transmitting the 'values on which our society rests.' Ambach v. Norwick, 441 U.S. 68, 76, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979)." Plyler, 457 U.S. at 221, 102 S.Ct. 2382.

One of the most fundamental of those values is mutual respect. Indeed, our nation's devotion to such respect is manifest in the First Amendment itself, which prohibits the majority from establishing an official religion or prohibiting the exercise of any sincere religious belief, no matter how abhorrent it may be to many or most people.[5]

Students today must be prepared for citizenship in a diverse society. See Grutter v. Bollinger, 539 U.S. 306, 330, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) ("the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints"). As increasingly recognized, one dimension of our nation's diversity is differences in sexual orientation. In Massachusetts, at least, those differences may result in same-sex marriages.

In addition, as described earlier, Massachusetts law prohibits discrimination based on sexual orientation. M.G.L. c. 76, § 5. Consistent with this, the Department of Education requires that all public schools teach respect for all individuals regardless of, among other things, sexual

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[5] The First Amendment states, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. These requirements also apply to the states. See McCreary County v. ACLU, 545 U.S. 844, 853, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005).

orientation. 603 C.M.R. § 26.06(1). It also encourages instruction concerning different types of families. Massachusetts Comprehensive Health Curriculum Framework at 30, 33. Some families are headed by same-sex couples.

The alleged conduct of the defendants at issue in this case was responsive to these requirements and standards. In view of the value to the community of preparing students to respect differences in their personal interactions with others and in their future participation in the political process, the conduct at issue in this case is rationally related to the goal of preparing them for citizenship. It is also rationally related to the goal of eradicating what the Massachusetts Supreme Judicial Court characterized as the "deep and scarring hardship" that the ban on same-sex marriages imposed "on a very real segment of the community for no rational reason." Goodridge, 440 Mass. at 341, 798 N.E.2d 941.

Moreover, attempting to teach young, elementary school students to respect gays and lesbians is also rationally related to the legitimate pedagogical purpose of fostering an educational environment in which gays, lesbians, and the children of same-sex parents will be able to learn well. As the Ninth Circuit has explained:

> The demeaning of young gay and lesbian students in a school environment is detrimental not only to their psychological health and well-being, but also to their educational development. Indeed, studies demonstrate that "academic underachievement, truancy, and dropout are prevalent among homosexual youth and are the probable consequences of violence and

> verbal and physical abuse at school." One study has found that among teenage victims of anti-gay discrimination, 75% experienced a decline in academic performance, 39% had truancy problems and 28% dropped out of school. Another study confirmed that gay students had difficulty concentrating in school and feared for their safety as a result of peer harassment, and that verbal abuse led some gay students to skip school and others to drop out altogether. Indeed, gay teens suffer a school dropout rate over three times the national average. In short, it is well established that attacks on students on the basis of their sexual orientation are harmful not only to the students' health and welfare, but also to their educational performance and their ultimate potential for success in life.

Harper v. Poway Unified School District, 445 F.3d 1166, 1178-79 (9th Cir.2006) (internal citations and references omitted).

"Minds, of course, are hard to change." Howard Gardner, Changing Minds: The Art and Science of Changing our Own and Other People's Minds 1 (2004). "[A] key to changing a mind is to produce a shift in the individual's 'mental representations[.]' " Id. at 5. As it is difficult to change attitudes and stereotypes after they have developed, it is reasonable for public schools to attempt to teach understanding and respect for gays and lesbians to young students in order to minimize the risk of damaging abuse in school of those who may be perceived to be different.

2. The Free Exercise Clause Claim

Plaintiffs also assert that the defendants' alleged conduct violates their First Amendment rights to exercise their religion freely as well as their parental rights to raise their children. They contend that this presents a "hybrid" claim that must be decided under the strict scrutiny standard, which requires that challenged conduct have more than a mere rational basis. However, in Brown, the First Circuit rejected the same claim. See 68 F.3d at 538-39. Brown is binding precedent on this issue too. Therefore, the rational basis standard applies to plaintiffs' Free Exercise Clause claim. See Leebaert, 332 F.3d at 143-44; Swanson, 135 F.3d at 700.

More specifically, government conduct that "is neutral and of general applicability need not be justified by a compelling state interest even if [it] has the incidental effect of burdening a particular practice." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). See also Employment Division, Oregon Department of Human Resources v. Smith, 494 U.S. 872, 881 & n. 1, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990); Brown, 68 F.3d at 538-39. Plaintiffs do not allege that the conduct at issue is not neutral or not of general applicability. Rather, they argue that this case is covered by a hybrid exception to the general rule.

In Smith, the Supreme Court described such a hybrid exception, requiring heightened scrutiny for cases that involve " 'the Free Exercise Clause in conjunction with other constitutional protections.' " Brown, 68 F.3d at 539 ( quoting Smith, 494 U.S. at 881 & n. 1, 110 S.Ct. 1595). In Smith, the Court

stated that a hybrid claim requiring heightened scrutiny could exist in a case involving conduct that violated the Free Exercise Clause and a parental right. 494 U.S. at 881, 882, 110 S.Ct. 1595.[6]

The parent plaintiffs in Brown asserted that they had alleged such a hybrid claim. The First Circuit rejected this contention, writing:

> The most relevant of the so-called hybrid cases is Wisconsin v. Yoder, 406 U.S. 205, 232-33, 92 S.Ct. 1526, 1541-42, 32 L.Ed.2d 15 (1972), in which the Court invalidated a compulsory school attendance law as applied

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[6] As the Second Circuit has noted "no circuit has yet actually applied strict scrutiny based on [the hybrid] theory." Leebaert, 332 F.3d at 142. In contrast to the First Circuit in Brown, the Second Circuit understands the discussion in Smith concerning hybrid claims to be only dicta and, therefore, not binding. Id. at 143. It has decided not to apply heightened scrutiny to hybrid claims, writing:In Kissinger v. Board of Trustees of the Ohio State University, College of Veterinary Medicine, 5 F.3d 177 (6th Cir.1993), a case involving free exercise and various other First Amendment claims, the court explicitly rejected a more stringent legal standard for hybrid claims. Id. at 180. The court explained that it did "not see how a state regulation would violate the [F]ree Exercise Clause if it implicates other constitutional rights but would not violate the Free Exercise Clause if it did not implicate other constitutional rights." Id. We too can think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated. "[T]herefore, at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard" to evaluate hybrid claims. Id. Id.This discussion might cause the First Circuit to reconsider its suggestion in Brown that heightened scrutiny is required for hybrid claims. 68 F.3d at 539.

> to Amish parents who refused on religious grounds to send their children to school. In so holding, the Court explained that Pierce stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when combined with a free exercise claim of the nature revealed by this record, more than merely a "reasonable relation to some purpose within the competency of the State" is required to sustain the validity of the State's requirement under the First Amendment.

Id. at 232-33, 92 S.Ct. at 1542 (discussing Pierce, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070). We find that the plaintiffs allegations do not bring them within the sweep of Yoder for two distinct reasons.

First, as we explained, the plaintiffs' allegations of interference with family relations and parental prerogatives do not state a privacy or substantive due process claim. Their free exercise challenge is thus not conjoined with an independently protected constitutional protection. Second, their free exercise claim is qualitatively distinguishable from that alleged in Yoder. As the Court in Yoder emphasized:

> the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's

> enforcement of a Statute generally valid as to others.

Id. at 235, 92 S.Ct. at 1543. Here, the plaintiffs do not allege that the one-time compulsory attendance at the Program threatened their entire way of life. Accordingly, the plaintiffs' free exercise claim for damages was properly dismissed.

68 F.3d at 539 (emphasis added).

This discussion and conclusion is equally applicable to the instant case. As explained earlier, as in Brown, "the plaintiffs' allegations do not state a privacy or substantive due process claim." Id. Rather, as the First Circuit also wrote in Brown, "the rights of parents as described by Meyer and Pierce do not encompass a broad-based right to restrict the flow of information in the public schools." Id. at 534.

Once again, Brown is not factually distinguishable from the instant case in any material respect. Nor has its authority on the hybrid claim issue "unmistakably been cast into disrepute by supervening authority." Eulitt, 386 F.3d at 349. Although the First Circuit has not had occasion to address the hybrid claim issue after Brown, the only comparable cases in other Circuits have reached the same result. See Swanson, 135 F.3d at 699-700 (relying in part on Brown in finding that a hybrid free exercise-parental rights claim was not alleged concerning a refusal to allow plaintiff's child to attend public school part-time); Leebaert, 332 F.3d at 143-44 (noting Brown in finding that heightened scrutiny was not required when a parent alleged that a school's refusal to

excuse his son from a mandatory health education course violated his free exercise and parental rights). Therefore, the defendants' conduct does not violate plaintiffs' free exercise rights if there is a rational basis for it. As explained earlier, such a justification amply exists in this case.[7]

3. Conspiracy

Plaintiffs have also failed to allege a conspiracy for which § 1983 provides a remedy. Such a conspiracy requires an agreement between two or more people, an overt act, and an actual deprivation of a right secured by the Constitution or laws of the United States. See Earle v. Benoit, 850 F.2d 836, 844 (1st Cir.1988).

As described earlier, the alleged conduct of the defendants in this case does not violate any right of the plaintiffs protected by the Constitution. No violation of any federal statutory duty is alleged. Therefore, any agreement among the defendants is not an unlawful conspiracy for which § 1983 would provide a remedy.

C. The State Law Claims Are Being Dismissed Without Prejudice

Because all of plaintiffs' federal claims are being dismissed, the court must decide whether to

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[7] The second reason relied upon by the First Circuit to reject the plaintiff parents' hybrid right claim in Brown also applies here. As in Brown, "the plaintiffs do not allege that [the conduct at issue] threatened their entire way of life." Brown, 68 F.3d at 539. Therefore, this case is distinguishable from Yoder. Moreover, it appears that even if the complaint were amended to make such an allegation, the First Circuit would again find that plaintiff's "free exercise claim is qualitatively distinguishable from that alleged in Yoder." Id.

exercise its discretion to retain jurisdiction over their state law claims. In this case is not appropriate to do so.

"As a general principle, the unfavorable disposition of a plaintiff's federal claims at the early stages of a suit, well before the commencement of trial, will trigger the dismissal without prejudice of any supplemental state-law claims." Rodriguez v. Doral Mortgage Corp., 57 F.3d 1168, 1177 (1st Cir.1995). The Supreme Court has explained that:

> It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial ... the state claims should be dismissed as well.

United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

It is particularly appropriate that this guidance be followed in the instant case. Among other things, plaintiffs allege a violation of the statute that requires parents be given notice and an opportunity to exempt their children from any

"curriculum which primarily involves human sexual education or human sexuality," M.G.L. c. 71, § 32A. The parties dispute whether there is a private right of action to enforce this statute. Moreover, defendants contend that the conduct at issue in this case does not "primarily involve[ ] human sexual education or human sexuality."

The courts of the Commonwealth of Massachusetts have not decided either of these issues. General considerations of comity, and the particular value of providing the Massachusetts courts an opportunity to decide authoritatively the meaning of the Massachusetts statute, persuade this court that plaintiffs' pendent state claims should now be dismissed without prejudice.

IV. ORDER

In view of the foregoing, it is hereby ORDERED that:

1. Defendants' motion to dismiss (Docket No. 18) as to Count I, which includes all of plaintiffs' federal claims, is ALLOWED.

2. Plaintiffs' remaining state law claims are DISMISSED without prejudice to being reinstituted in the courts of the Commonwealth of Massachusetts.

/s/ Mark L. Wolf
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Docket No. 06-CV-10751

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DAVID PARKER, TONIA PARKER, Individually and as next friends and guardians of Jacob Parker and Joshua Parker, JACOB PARKER, JOSHUA PARKER,

JOSEPH ROBERT WIRTHLIN, ROBIN WIRTHLIN, Individually and as next friends and guardians of Joseph Robert Wirthlin, Jr., JOSEPH ROBERT WIRTHLIN, Jr.,

PLAINTIFFS,

vs.

WILLIAM HURLEY, PAUL B. ASH, PH.D, Individually and as Superintendents of the Town of Lexington Public Schools,

HELEN LUTTON COHEN, THOMAS R. DIAZ, OLGA GUTTAG, SCOTT BURSON, THOMAS GRIFFITH, Individually and as members of the Town of Lexington School Committee,

ANDRE RAVENELLE, Individually and as Director of Education of the Town of Lexington.

JONI JAY, Individually and as Principal of the Estabrook Elementary School,

JENNIFER WOLFRUM, Individually and as Coordinator of Health Education,

HEATHER KRAMER, Individually and as a Teacher at the Estabrook Elementary School, and

TOWN OF LEXINGTON,

DEFENDANTS.

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## COMPLAINT AND JURY DEMAND

### INTRODUCTION

This is a claim brought by four parents and their very young children against the Town of Lexington, its school board, various administrators and a teacher. The plaintiffs are devout Judeo-Christians. They claim that the defendants have intentionally interfered with their Fourteenth Amendment due process rights to direct the moral upbringing of their own children.

The defendants have begun a campaign of intentionally indoctrinating very young children to affirm the notion that homosexuality is right and moral, in direct denigration of the plaintiffs' deeply-held faith. The plaintiffs tolerate and respect all people but wish to teach their faith to their children at their own pace, and in their own way.

The claim is brought pursuant to 42 U.S.C. § 1983, the Massachusetts Civil Rights Act, Mass.

Gen. Laws ch. 12, § 11I, and the Massachusetts Opt Out Statute.

## PARTIES

1. The plaintiff David Parker is an individual who lives at 541 Bedford Street, Town of Lexington, County of Middlesex, Commonwealth of Massachusetts.
2. The plaintiff Tonia Parker is an individual who lives at 541 Bedford Street, Town of Lexington, County of Middlesex, Commonwealth of Massachusetts. Hereinafter, the plaintiffs David Parker and Tonia Parker will be referred to from time to time collectively as the "adult plaintiffs."
3. The plaintiff Jacob Parker is an individual who lives at 541 Bedford Street, Town of Lexington, County of Middlesex, Commonwealth of Massachusetts. Jacob Parker is a minor child. His parents and legal guardians are the plaintiffs Tonia and David Parker.
4. The plaintiff Joshua Parker is an individual who lives at 541 Bedford Street, Town of Lexington, County of Middlesex, Commonwealth of Massachusetts. Joshua Parker is a minor child. His parents and legal guardians are the plaintiffs Tonia and David Parker.
5. The plaintiff Joseph Robert Wirthlin is an individual who lives at 71 Bedford Street, Town of Lexington, County of Middlesex, Commonwealth of Massachusetts.

6. The plaintiff Robin Olsen Wirthlin is an individual who lives at 71 Bedford Street, Town of Lexington, County of Middlesex, Commonwealth of Massachusetts. Hereinafter, the plaintiffs Joseph Wirthlin and Robin Wirthlin will be referred to from time to time collectively as the "adult plaintiffs."

7. The plaintiff Joseph Robert Wirthlin, Jr. is an individual who lives at 71 Bedford Street, Town of Lexington, County of Middlesex, Commonwealth of Massachusetts. Joseph Robert Wirthlin, Jr. is a minor child. His parents and legal guardians are the plaintiffs Joseph and Robin Wirthlin.

8. The defendant William Hurley is an individual whose residence is unknown to the plaintiffs. Plaintiffs aver that Mr. Hurley is domiciled within the Commonwealth of Massachusetts. Mr. Hurley was at pertinent times the Superintendent of the Public Schools of the Town of Lexington, County of Middlesex, Massachusetts and regularly does business within said Town.

9. The defendant Paul B. Ash, Ph.D. is an individual whose residence is unknown to the plaintiffs. Plaintiffs aver that Dr. Ash is domiciled within the Commonwealth of Massachusetts. Dr. Ash is the current Superintendent of the Public Schools of the Town of Lexington, County of Middlesex, Massachusetts and regularly does business within said Town.

10. The defendant Helen Lutton Cohen is an individual whose residence is unknown to the plaintiffs. Plaintiffs aver that Ms. Cohen is domiciled within the Commonwealth of Massachusetts. Ms. Cohen at all pertinent times was a duly elected member of the School Committee of the Public Schools of the Town of Lexington, County of Middlesex, Massachusetts and regularly does business within said Town.

11. The defendant Thomas R. Diaz is an individual whose residence is unknown to the plaintiffs. Plaintiffs aver that Mr. Diaz is domiciled within the Commonwealth of Massachusetts. Mr. Diaz at all pertinent times was a duly elected member of the School Committee of the Public Schools of the Town of Lexington, County of Middlesex, Massachusetts and regularly does business within said Town.

12. The defendant Olga Guttag is an individual whose residence is unknown to the plaintiffs. Plaintiffs aver that Ms. Guttag is domiciled within the Commonwealth of Massachusetts. Ms. Guttag at all pertinent times was a duly elected member of the School Committee of the Public Schools of the Town of Lexington, County of Middlesex, Massachusetts and regularly does business within said Town.

13. The defendant Scott Burson is an individual whose residence is unknown to the plaintiffs. Plaintiffs aver that Mr. Burson is domiciled within the

Commonwealth of Massachusetts. Mr. Burson at all pertinent times was a duly elected member of the School Committee of the Public Schools of the Town of Lexington, County of Middlesex, Massachusetts and regularly does business within said Town.

14. The defendant Thomas Griffith is an individual whose residence is unknown to the plaintiffs. Plaintiffs aver that Mr. Griffith is domiciled within the Commonwealth of Massachusetts. Mr. Griffith at all pertinent times was a duly elected member of the School Committee of the Public Schools of the Town of Lexington, County of Middlesex, Massachusetts and regularly does business within said Town.

15. The defendant Andre Ravenelle is an individual whose residence is unknown to the plaintiffs. Plaintiffs aver that Mr. Ravenelle is domiciled within the Commonwealth of Massachusetts. Mr. Ravenelle is and at all pertinent times was the Director of Education for the Town of Lexington, County of Middlesex, Massachusetts and regularly does business within said Town.

16. The defendant Joni Jay is an individual whose residence is unknown to the plaintiffs. Plaintiffs aver that Ms. Jay is domiciled within the Commonwealth of Massachusetts. Ms. Jay is and at all pertinent times was the Principal of the Estabrook Elementary School, an elementary school located in the Town of

Lexington, County of Middlesex, Massachusetts and regularly does business within said Town.

17. The defendant Jennifer Wolfrum is an individual whose residence is unknown to the plaintiffs. Plaintiffs aver that Ms. Wolfrum is domiciled within the Commonwealth of Massachusetts. Ms. Wolfrum was at pertinent times the Co-ordinator of Health Education of the Town of Lexington, County of Middlesex, Massachusetts and regularly does business within said Town.

18. The defendant Heather Kramer is an individual whose residence is unknown to the plaintiffs. Plaintiffs aver that Ms. Kramer is domiciled within the Commonwealth of Massachusetts. Ms. Kramer was at pertinent times a teacher at the Estabrook Elementary School, an elementary school located in the Town of Lexington, County of Middlesex, Massachusetts and regularly does business within said Town.

19. The defendant Town of Lexington, County of Middlesex, Massachusetts is a municipal corporation that can sue and be sued.

## FACTS COMMON TO ALL COUNTS

### THE PARKERS

20. At all pertinent times, David and Tonia Parker, the adult plaintiffs, were married to one another. The adult plaintiffs are the natural parents of the plaintiffs Jacob and

Joshua, who were born on March 27, 1999, and October 30, 2000, respectively.

21. In or around 2004, the adult plaintiffs, together with their two natural children, moved to Lexington, Massachusetts following a corporate restructuring by Mr. Parker's employer.

22. The adult plaintiffs were attracted to the Town primarily by its highly-touted school system.

23. The plaintiffs are devout Judeo-Christians. Included in their core Judeo-Christian beliefs is the concept that issues pertaining to sexual intimacy, procreation, human sexuality, and the holy basis of matrimony should remain private within families, be introduced by parents, and governed by the laws of the God of Abraham. Also included is the concept that homosexual behavior is immoral in that it violates God's law.

24. The Parkers enrolled Jacob in the public schools upon reaching kindergarten age. In September 2004, five-year old Jacob began attending kindergarten classes at Estabrook Elementary School.

25. Almost immediately thereafter, the defendants commenced an intentional campaign to teach the Parkers' very young child that the family's religious faith was incorrect.

26. On January 14, 2005, Jacob Parker brought home a "Diversity Book Bag." The ostensible purpose of the "book bag" was "intended to strengthen the connections among our school population and build an atmosphere of tolerance and respect for

cultural racial ability and family structure diversity." The goal according to the defendants was to "engage the student and parent population in a sustained effort of acknowledging and celebrating the diverse backgrounds and families in our school community." The bag contained a book titled, Who's in a Family by Robert Skutch. Upon reviewing the book, the Parkers realized that the book appeared to depict homosexual couples with children. The Parkers had received no notice that these materials would be sent home at that time.

27. Jacob is now in the first grade. First graders have a "reading center" in the classroom that serves as a mini-library. The same book, Who's in a Family, is in Jacob's reading center along with an additional book, Molly's Family by Nancy Garden, depicting gay and lesbian relationships and gay and lesbian marriage. These books are available to Jacob without parental notification and there is no method by which the Parkers could exercise an opt-out option. They are available without parental supervision.

28. This subject is one of great concern to the Parkers. By virtue of their strong religious faith, the Parkers adhere to a religious principle that holds that marriage is holy matrimony by definition, a union between a man and a woman, and that labeling marriage to be otherwise is immoral. The notion of the acceptable interchangeability of male and female within the marriage construct and within a personal identity

dictated by nature is not consistent with the Parkers' sincerely-held religious beliefs, nor is the sexual acting out of same-sex attraction (homosexuality).

29. The Parkers recognize that at some point, their children will be exposed to the knowledge that the Commonwealth of Massachusetts endorses as legal some marriages they believe to be inconsistent with their faith. However, they did not wish to discuss the topic of homosexual marriage or homosexuality and transgenderism with Joshua or Jacob at their current ages.

30. On information and belief, the individual defendants Joni Jay and William Hurley, as well as the defendant School Committee members, were among those individually responsible for introducing the book Who's in a Family to Jacob's class, and they did so on behalf of the Town. When they and the Town included Who's in a Family in the book bag, they acted with the specific intention to indoctrinate young children into the concept that homosexuality and homosexual relationships or marriage are moral and acceptable behavior.

31. In order to determine whether their child would receive additional information in school related to homosexuality and transgenderism, the Parkers initiated a dialogue via email with the Principal of the School, Joni Jay, and the Superintendent of Schools, William Hurley. On January 21, 2005, David and Tonia Parker met with Principal Jay to discuss their concern. At

this meeting, the Parkers repeatedly objected to any exposure to or discussions of homosexuality, transgenderism, bisexuality, sexual orientation, and homosexual marriage by any adult within the School to their five-year-old son. Ms. Jay responded, "Any adult within the school can discuss homosexual families and homosexual issues with your child. This is not a parental notification issue."

32. On or around February 8, 2005, the Parkers began attending the Estabrook Elementary School's Anti-Bias Committee meetings. On February 8, 2005, the couple attended a meeting featuring Jon Pfeifer, a Gay Lesbian Straight Education Network (GLSEN) representative. The meeting's subject was titled "How and Why to Talk to Your Children about Diversity." In fact, the meeting focused exclusively upon homosexuality and how to acclimate young children to it. Mr. Pfeifer encouraged the Committee to place many homosexual family books in each classroom, hang gay and lesbian family posters in each classroom, and encourage teacher-initiated discussions in each class. Mr. Pfeifer's response to one parent's comment that kids learn negative jargon at a young age was "kids learn easier . . . go through year after year and it'll be better." Several teachers and the Principal of the Estabrook Elementary School attended the meeting, and visibly and verbally affirmed this action plan.

33. On information and belief, the Town, School Committee, Ms. Jay, Mr. Hurley, and Dr. Ash have adopted Mr. Pfeifer's suggestions. On information and belief, the purpose of adopting these suggestions is the specific intention to indoctrinate young children into the concept that homosexuality and marriage between same-sex partners is moral and accepted, and that those who hold a faith such as the Parkers are incorrect in their beliefs. Essentially, the defendants are requiring the minor plaintiffs to affirm a belief inconsistent with and prohibited by their religion. Such indoctrination is inconsistent with the Parkers' sincere and deeply-held religious faith.

34. As a result of these concerns, the Parkers decided to make a specific request of the Lexington Public Schools. On March 4, 2005, they wrote to the defendant Principal Jay, the defendant Mr. Ravenelle, the defendant Ms. Wolfrum, and the defendant Superintendent Hurley. The Parkers specifically requested that no teacher or adult expose their child to any materials or discussions featuring sexual orientation, same-sex unions, or homosexuality without notification to the Parkers and the right to "opt out."

35. Principal Jay responded on March 4, 2005 that it was the School's position that parents would not be notified of any discussions, even adult-initiated discussions, which dealt with gay-headed families, as such information was not

included in the School's parental notification policy.

36. On March 6, 2005, the Parkers sent an email to Principal Jay of the Estabrook Elementary School and the Anti-Bias Committee requesting information. No one responded to it.

37. The Parkers were concerned by the tone of the February 8, 2005 Anti-Bias Committee meeting. For this reason, they attended more meetings; at one meeting, which occurred on April 11, 2005, it was announced that more homosexually-themed books would be placed in each classroom without parental notification. This greatly concerned the Parkers.

38. The Parkers asserted that the School's position was contrary to their religious views and parental rights to raise their children in accordance with their personal beliefs. They requested a meeting to discuss the matter in person with Principal Jay. Ms. Jay invited the Parkers to a meeting with herself and Andre Ravenelle, the Director of Education, to take place on April 27, 2005 at 3:00 p.m. at Estabrook Elementary School. At the meeting, the Parkers met with both Ms. Jay and Mr. Ravenelle. The meeting focused on the Parkers' interim need to have a plan in place for the remainder of the school year. A handwritten agreement was drafted and faxed to the Superintendent's Office. Ms. Parker left the meeting, while Mr. Parker remained. At some point, Mr. Parker was informed that the School would not agree

to any temporary plan, and the meeting was terminated. Mr. Parker, frustrated by the turn of events, refused to leave the school and was arrested for trespassing by the Lexington Police Department.

39. Subsequently, the defendant Superintendent Hurley issued a no-trespassing order against Mr. Parker, banning him from all school property. (In November 2005, the no-trespass order was dismissed by the new Superintendent, the defendant Dr. Ash.)

40. Following the arrest of Mr. Parker, Mr. Hurley, along with the Lexington Chief of Police Christopher Casey, released a statement to the press and community that was sent home with all Lexington Public School children in their book bags. It reads in full:

> At the request of Mr. and Mrs. Parker, a school principal and the Director of Curriculum and Instruction for the Lexington Public Schools ("Administrators") met with the Parkers on Wednesday, April 27, 2005, starting at approximately 3:00 p.m. The Administrators agreed to meet with the Parkers to consider their several requests, which appeared related to a picture book entitled "Who's in a Family?" The book was among several included in a "diversity book bag" that children in the Lexington Public Schools are permitted to take home for parents to read with their child if they wish.

The book is designed for young children and includes illustrations of children accompanied by various parent figures, including two individuals of different genders, two individuals of the same gender, grandparents, bi-racial couples, as well as a one-parent family.

In particular, the Parkers requested the Administrators to ensure that in the future, teachers automatically excuse or remove the Parkers' child even when discussions about such issues arise, even if spontaneously. In response, the Administrators described Lexington Public Schools' policy, adopted under state law (Chapter 71, Section 32A), allowing students to opt out of curriculum that "primarily involves human sexual education or human sexuality issues." The Administrators explained that granting the Parkers' request was not required by the Policy or statutory language. In addition, they explained that implementation of the Parkers' request was simply not practical, since children could even discuss such matters among themselves at school.

The Administrators informed the Parkers that they could appeal the response both within the school

department and, if necessary, to the Commissioner of Education. However, Mr. Parker replied, "Other people have tried that and it did not work." The Parkers stated that they would not leave the school until their demands were met.

With the hours passing and the Parkers refusing to leave the school building, the Lexington Police were notified. While Mrs. Parker chose to leave before police arrival, Mr. Parker did not. Two plain-clothed detectives arrived at 5:20 p.m., followed by a Police Lieutenant at 6:00 p.m. All attempted to coax Mr. Parker to leave voluntarily. However, Mr. Parker made it clear that he would not leave unless his demands were met and that he knew he was engaging in "civil disobedience" and was willing to accept the consequences. Mr. Parker declared, "If I'm not under arrest then I'm not leaving." Mr. Parker also used his cell phone to make a number of phone calls, and a small group of people began arriving with cameras.

Finally, when it became necessary for the administrative staff to leave and secure the building, the police arrested Mr. Parker at 6:24 p.m. The group with the video camera

was waiting behind the police station and photographed Mr. Parker's arrival. Mr. Parker was processed at the police station, afforded all his rights, and after using the telephone, chose not to be bailed. He was held overnight at the Lexington Police Station and in the morning was transported to the Concord District Court for arraignment.

41. The defendant Scott Burson, an elected member of the Lexington School Committee, also commented publicly at the May 27, 2005 School Committee meeting that he was "particularly distressed at trying to turn our children into cannon fodder in the culture wars. They deserve better." While he did not specifically mention the Parker family, on information and belief, the comments were directed toward the Parkers and others.

42. During the current 2005 -2006 school year, the Parkers' oldest son Jacob is in the first grade at the Estabrook Elementary School. In September 2006, the second of the Parkers' children, Josh, is expected to begin kindergarten at Estabrook Elementary School. On December 2, 2005, the Parkers again notified the Superintendent's Office of their request via a Parental Right Assertion. They requested:

to be notified when there are plans to discuss/present homosexuality, trans-genderism, or gay relationships/ marriage in our son's presence. When "spontaneous" adult discussion arises with the intent to affirm, validate, celebrate, and/or normalize homosexuality, transgenderism, or gay relationships/marriage – we request that our child be removed from this discussion. We request to also be notified in advance of any other planned human sexual education and human sexuality issues such as abortion, birth-control, pre-marital sex, or surveys. We also request to view any materials within the school pertaining to the aforementioned topics within the reach of our child.

43. On or about September 22, 2005, the defendant Superintendent Ash issued a statement that (on information and belief) was generated in part by the controversy surrounding the plaintiffs' reasonable and constitutional requests. The statement reads, in its entirety:

**What does the law say schools have to do? By Paul Ash Superintendent of Schools, Lexington, MA. Published in the *Lexington Minuteman* Thursday, September 22, 2005**

Over the summer, I have received a number of questions about implementation of Massachusetts General Laws, Chapter 71, Section 32A ("Section 32A"). These questions relate to the following provision:

> Every city, town, regional school district or vocational school district implementing or maintaining curriculum which primarily involves human sexual education or human sexual issues shall adopt a policy ensuring parental/guardian notification. Such policy shall afford parents or guardians the flexibility to exempt their children from any portion of said curriculum through written notification to the school principal.

In Lexington, curriculum identified by the statute generally begins at the fifth-grade level. LPS [Lexington Public Schools] has, of course, adopted a policy implementing Section 32A, and school staff routinely provide parents with notice and the flexibility to "opt out" of this curriculum.

Recently, questions have been raised as to whether school staff also has an obligation to notify parents and allow "opt out" of other school-based activities, particularly in the elementary grades. For example, some parents have

requested they be notified whenever their child has access to any material, conversation, or activity that acknowledges differences in sexual orientation, including any reference to families with same-gender parents.

Since elementary curriculum often elicits discussion of family experiences, such references certainly may occur. In addition, our schools routinely provide students with access to materials, activities, and discussions that recognize diversity. This access is designed to assist us in our goal of maintaining an appropriate and respectful educational environment for all students. As required by law and LPS policy, this environment must be free of discrimination based on race, gender, color, religion, sexual orientation, national origin and disability.

The Massachusetts Department of Education, which is responsible for administering Section 32A, has explained that activities and materials designed to promote tolerance and respect for individuals, including recognition of differences in sexual orientation "without further instruction on the physical and sexual implications" do not trigger the notice and opt out provisions of Section 32A. Under this standard, staff has no obligation to notify parents of discussions, activities, or materials that simply reference same-gender parents or that

otherwise recognize the existence of differences in sexual orientation. Accordingly, I expect teachers to continue to allow children access to such activities and materials to the extent appropriate to children's ages, to district goals of respecting diversity, and to the curriculum. As this new school year begins, I look forward to working with the Lexington community to provide a positive educational environment for all students.

44. This release is inaccurate and intentionally crafted to demean the Parkers' legitimate and constitutional concerns. Specific problems are identified below:

A. The language of the statute is quoted incorrectly. The actual language refers to "human **sexuality** issues" not "human sexual issues."

B. The phrase "In Lexington, curriculum identified by the statute begins in fifth grade . . ." is self-serving and misleading. The statute does not identify any specific curriculum. It refers to topics within the constitutionally established zone of familial privacy.

C. The phrase "some parents have requested they be notified whenever their child has access to any material, conversation, or activity that acknowledges differences in sexual orientation, including any

reference to families with same-gender parents," is clearly intended to refer to the plaintiffs and other like-minded Judeo-Christians. It belittles their constitutional concerns by suggesting that the plaintiffs wish to interfere or control playground banter, when, in fact, at all pertinent times the plaintiffs explicitly expressed concern only with adult-initiated indoctrination.

45. In December 2005, the defendant Superintendent Ash formally rejected the Parkers' request for notification.

46. These actions caused the plaintiffs severe emotional distress.

47. Young children of the ages of the two Parker children are far more susceptible to indoctrination and persuasion than are children even a few years older.

48. At all pertinent times, the actions of the defendants jointly and severally constituted "state action" as that term is defined in the various counts below.

49. There exists a true and justiciable conflict between the plaintiffs and the defendants, which conflict is certain to continue such that declaratory relief may be granted.

**THE WIRTHLINS**

50. At all pertinent times, Joseph and Robin Wirthlin, the adult plaintiffs, were married to one another. The adult plaintiffs are the natural parents of the plaintiff Joseph Robert Wirthlin, Jr., "Joey," who was born on September 13, 1998.

51. At all pertinent times, the minor plaintiff Joey was enrolled in the second grade at the aforesaid Estabrook Elementary School.

52. Each week, the teacher chooses books to place on a particular bookshelf in the classroom. The children are supposed to read the books and determine the unifying theme of the books. The theme of the week ending March 24, 2006 was "weddings."

53. On or about Friday, March 24, 2006, the teacher in Joey's class, defendant Heather Kramer, read out loud to the students from a book entitled King and King, which she had selected from the library. This book describes a romantic attraction between two men. The protagonist is a male prince who is told by his mother that he needs to find a wife. He rejects several females for superficial reasons such as the fact that one princess is "black" and has arms that are too long. One princess is too fat, and one has glasses and crooked teeth. He then discovers he is homosexual, falls in love and lives happily ever after with another homosexual male. The two males are graphically depicted as kissing at the end of the book.

54. Like the Parkers, the Wirthlin plaintiffs are devout Judeo-Christians. Included in their core Judeo-Christian beliefs is the concept that issues pertaining to sexual intimacy, procreation, human sexuality, and the holy basis of matrimony should remain private within families, be introduced by parents, and governed by the

laws of the God of Abraham. Also included is the concept that homosexual behavior is immoral in that it violates God's law.

55. This theme of romantic physical contact between two men is not one that the Wirthlins wish to have celebrated and affirmed to their young, seven-year-old son, because it is in contravention of their sincerely and deeply-held faith.

56. On information and belief, the defendant Ms. Kramer knew or should have known that reading King and King would be in direct contravention of the deeply-held faith of the Wirthlins and possibly others. On information and belief, Ms. Kramer selected King and King to read to the students for the express purpose of indoctrinating them into the concept that homosexuality and marriage between same-sex partners is moral. In so doing, she consciously intended to intrude upon the Wirthlins' right to direct the moral upbringing of their own children.

57. The evening of the reading, Joey returned home and was agitated. He told his parents about the book, which he described as "so silly."

58. The Wirthlins then sent an email to Ms. Kramer, and requested clarification. Ms. Kramer telephoned them on Monday, March 27, 2006, confirming the book had been read, and told them the name of the book.

59. On March 30, 2006, the Wirthlins attended a previously scheduled parent-teacher

conference with Ms. Kramer. The book was not discussed.

60. Later that same day, the Wirthlins emailed Ms. Kramer specifically to arrange a meeting to discuss the book. A meeting for the next day was arranged.

61. On March 31, 2006, Ms. Kramer called in the morning and asked to postpone the meeting and to choose a different time to meet. Additional emails were exchanged and a new meeting was set for April 6, 2006. She also asked what the topic of the meeting would be. The Wirthlins indicated they had additional concerns and wanted to discuss the book that was read.

62. On or about April 5, 2006, the Wirthlins received a telephone call from the defendant Principal Jay. Ms. Jay asked them who they were bringing, besides themselves, to the scheduled meeting, and informed the Wirthlins that she intended to be present. She also inquired as to the intended outcome.

63. On April 6, 2006, the meeting took place. Principal Jay presented the plaintiffs with the letter Dr. Ash had previously written. (See paragraph 43, supra.) She took the position that allowing second-graders to view the book King and King was consistent with Dr. Ash's statement. Ms. Jay was cordial but unwilling to bend at all on the issue of notice. Essentially, she reiterated Dr. Ash's statement and indicated that it was the only policy that would be considered.

64. On or about April 11, 2006, the Wirthlins received an email from the defendant Principal Jay stating that their concerns were at a "district-wide level" and that she would not be able to answer them.

65. At the meeting on April 6, 2006, the Wirthlins repeatedly requested that they be informed before the adult defendants intentionally presented themes of homosexuality to their children. The defendants have indicated that they will not do so; to the precise contrary, the defendants intend to persist in presenting themes of romantic homosexual activity to second-graders.

66. On information and belief, the reason why the defendants will not inform the Wirthlins is that the defendants' specific intention is to coercively indoctrinate the children into moral belief systems that are markedly different from those of their parents, and the defendants harbor a specific intention to denigrate the Wirthlins' sincere and deeply-held faith. The Wirthlins wish to direct the personal moral and religious views of their own children and believe these children are too young, at ages seven and eight to be able to comprehend the complexities of such a controversial and advanced topic.

67. On or about April 13, 2006, the plaintiff Robin Wirthlin encountered the defendant Ms. Jay in the Wirthlins' daughter's classroom. RobinWirthlin asked Ms. Jay why she would not further discuss the issues, and again sought to discuss the

issues with Principal Jay. Ms. Jay refused to discuss the issues with the Wirthlins, and stated that she had been instructed by Dr. Ash not to speak with the Wirthlins about these issues.

68. The conduct of Ms. Jay and Dr. Ash is the direct implementation of an unconstitutional policy planned and conducted by themselves and the other co-defendants.

69. There exists a true and justiciable conflict between the plaintiffs and the defendants, which conflict is certain to continue such that declaratory relief may be granted.

## COUNT I:
## 42 U.S.C. § 1983/DUE PROCESS VIOLATION

## UNREASONABLE INTRUSION INTO HYBRID RIGHTS TO DIRECT MORAL UPBRINGING OF CHILDREN, FAMILIAL PRIVACY, AND FREE EXERCISE OF RELIGION

70. The plaintiffs repeat and reallege each and every allegation set forth in the above-captioned paragraphs and incorporate them by reference as if fully and completely set forth herein.

71. The aforesaid acts of the defendants intruded upon and impaired the adult plaintiffs' clearly established substantive due process rights under the Fifth and Fourteenth Amendments, as parents and guardians to direct the moral upbringing of

their children, and the clearly established rights of the minor children to such upbringing.

72. The aforesaid actions of the defendants constituted an unreasonable intrusion into the familial privacy rights of the respective plaintiffs in violation of the plaintiffs' clearly established rights under the Fourth and Fourteenth Amendments, and otherwise invaded and impaired the plaintiffs' clearly established rights to privacy under the Fourth, Fifth, and Fourteenth Amendments.

73. The aforesaid actions of the defendants invaded and impaired the plaintiffs' clearly established rights to the free exercise of their religion.

74. The combined effect of these deprivations is synergistic and requires the state to set forth a compelling state interest in its conduct. There is no compelling state interest in persisting in the indoctrination techniques being utilized by the defendants.

75. As a direct result of said unlawful acts, the plaintiffs sustained great damages.

76. Pursuant to 42 U.S.C. § 1988, plaintiffs are entitled to attorney's fees and expert fees in connection with the bringing of the claims alleged in this count.

## COUNT II:
## MASSACHUSETTS CIVIL RIGHTS ACT

77. The plaintiffs repeat and reallege each and every allegation set forth in the above

captioned paragraphs and incorporate them by reference as if fully and completely set forth herein.

78. By engaging in the conduct described above, including threats, intimidation and coercion, the defendants interfered with and deprived the plaintiffs of their exercise and enjoyment of their civil rights secured under the constitution and laws of the Commonwealth of Massachusetts in violation of Massachusetts General Laws Chapter 12, § 11I.

79. As a direct and proximate result of the defendants' violations of Mass. Gen. Laws ch. 12, § 11I, the plaintiffs suffered the injuries described above.

## COUNT III:
## MASSACHUSETTS "OPT OUT" STATUTE

80. The plaintiffs repeat and reallege each and every allegation set forth in the above captioned paragraphs and incorporate them by reference as if fully and completely set forth herein.

81. Massachusetts General Laws Chapter 71, § 32A reads as follows:

§ 32A. Parental Notification of Human Sexual Education Curriculum.

Every city, town, regional school district or vocational school district implementing or maintaining curriculum which primarily involves human sexual education or human sexuality issues shall adopt a policy

ensuring parental/guardian notification. Such policy shall afford parents or guardians the flexibility to exempt their children from any portion of said curriculum through written notification to the school principal. No child so exempted shall be penalized by reason of such exemption.

Said policy shall be in writing, formally adopted by the school committee as a school district policy and distributed by September first, nineteen hundred and ninety-seven, and each year thereafter to each principal in the district. A copy of each school district's policy must be sent to the department of education after adoption.

To the extent practicable, program instruction materials for said curricula shall be made reasonably accessible to parents, guardians, educators, school administrators, and others for inspection and review.

The department of education shall promulgate regulations for adjudicatory proceedings to resolve any and all disputes arising under this section.

82. The Town of Lexington has begun a program intended primarily to indoctrinate very young elementary school children in the notion that homosexuality and homosexual relationships and marriage are right and moral.

83. Pursuant to Mass. Gen. Laws ch. 71 § 32A, the plaintiffs have the right to be notified and to excuse their children from this curriculum.

84. The defendants have breached this right and by said breach have caused the plaintiffs great damage.

## COUNT IV:
## CONSPIRACY IN VIOLATION OF 42 U.S.C. § 1983

85. The plaintiffs repeat and reassert the allegations contained in the above paragraphs and incorporate them by reference as if fully and completely set forth herein.

86. By having engaged in the conduct described above, the defendants conspired to deprive the plaintiffs of their due process rights and their rights to equal protection of the law or of the equal privileges and immunities under the law, and they acted in furtherance of the conspiracy which resulted in the injury to the plaintiffs as described above, all in violation of 42 U.S.C. § 1983.

WHEREFORE, plaintiffs, jointly and severally, respectfully request this honorable court :

1. Pursuant to 28 U.S.C. § 2201, to declare and rule that there exists a justiciable controversy between the plaintiffs and the defendants;

2. Pursuant to 28 U.S.C. § 2201, to issue a declaratory judgment declaring that each defendant has violated each of the plaintiffs' constitutional rights of due process as set forth above;

3. Order equitable and injunctive relief ordering that:

A. The plaintiff parents be expressly and clearly notified prior to any adult-directed or initiated classroom discussions of sexuality, gender identity, and marriage constructs, until such time as the children are in seventh grade. Such notification must be explicit about the content, given in a timely manner, and involve the written consent of parents to opt children into these presentations/discussions.

B. The plaintiff parents be presented with an opportunity to excuse the children from classroom presentations or discussions the intent of which is to have children accept the validity of, embrace, affirm, or celebrate views of human sexuality, gender identity, and marriage constructs.

C. The plaintiff parents be presented with an opportunity to excuse the children from classroom presentations or discussions when the intent is to have children accept the validity of, embrace, affirm or celebrate belief systems or religious perspectives.

D. The plaintiff parents be presented with an opportunity to attend, as silent observers, and record any school presentations or discussions of the aforementioned ideological/socialization perspectives.

E. That no materials graphically depicting homosexual physical contact be submitted to the students until the seventh grade, with the provisions of Sections 3A and 3C.

4. Order payment of compensatory damages to the fullest extent allowed by law;
5. Order payment of special, exemplary, or punitive damages, to the fullest extent allowed by law;
6. Order payment of attorney's fees, expert fees, prejudgment interest, interest, costs and;
7. Provide such additional relief as the court deems just.

**JURY DEMAND**

PLAINTIFFS RESPECTFULLY REQUEST A TRIAL BY JURY ON ALL ISSUES SO TRIABLE.

RESPECTFULLY SUBMITTED,
PLAINTIFFS

By their attorneys,

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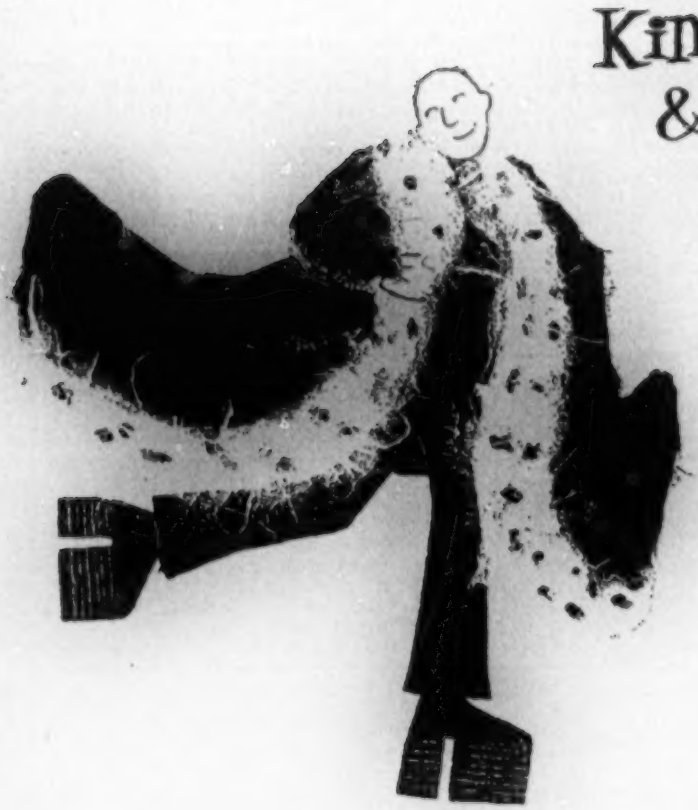
Dated: April 27, 2006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Originally published under the title *Koning & Koning*

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Tricycle Press
a little division of Ten Speed Press
P.O. Box 7123
Berkeley, California 94707
www.tenspeed.com

Book design by Betsy Stromberg
Typeset in DaddyOHip, Bailey Quad, Bailey Sans, and Blackadder

Library of Congress Cataloging-in-Publication Data
Haan, Linda de, 1976-
[Koning & Koning, English]
King & King / Linda de Haan & Stern Nijland
p. cm.
Summary: When the queen insists that the prince get married and take over as king, the search for a suitable mate does not turn out as expected.
ISBN 1-58246-061-2
[1. Kings, queens, rulers, etc.--Fiction. 2. Princes--Fiction. 3. Homosexuality--Fiction.] I. Title: King and King. II. Nijland, Stern, 1976- III. Title.
PZ7.H1132 Ki 2002
[E]--dc21

2001005082

First Tricycle Press printing, 2002
Printed in United States of America
2 3 4 5 6 7— 06 05 04

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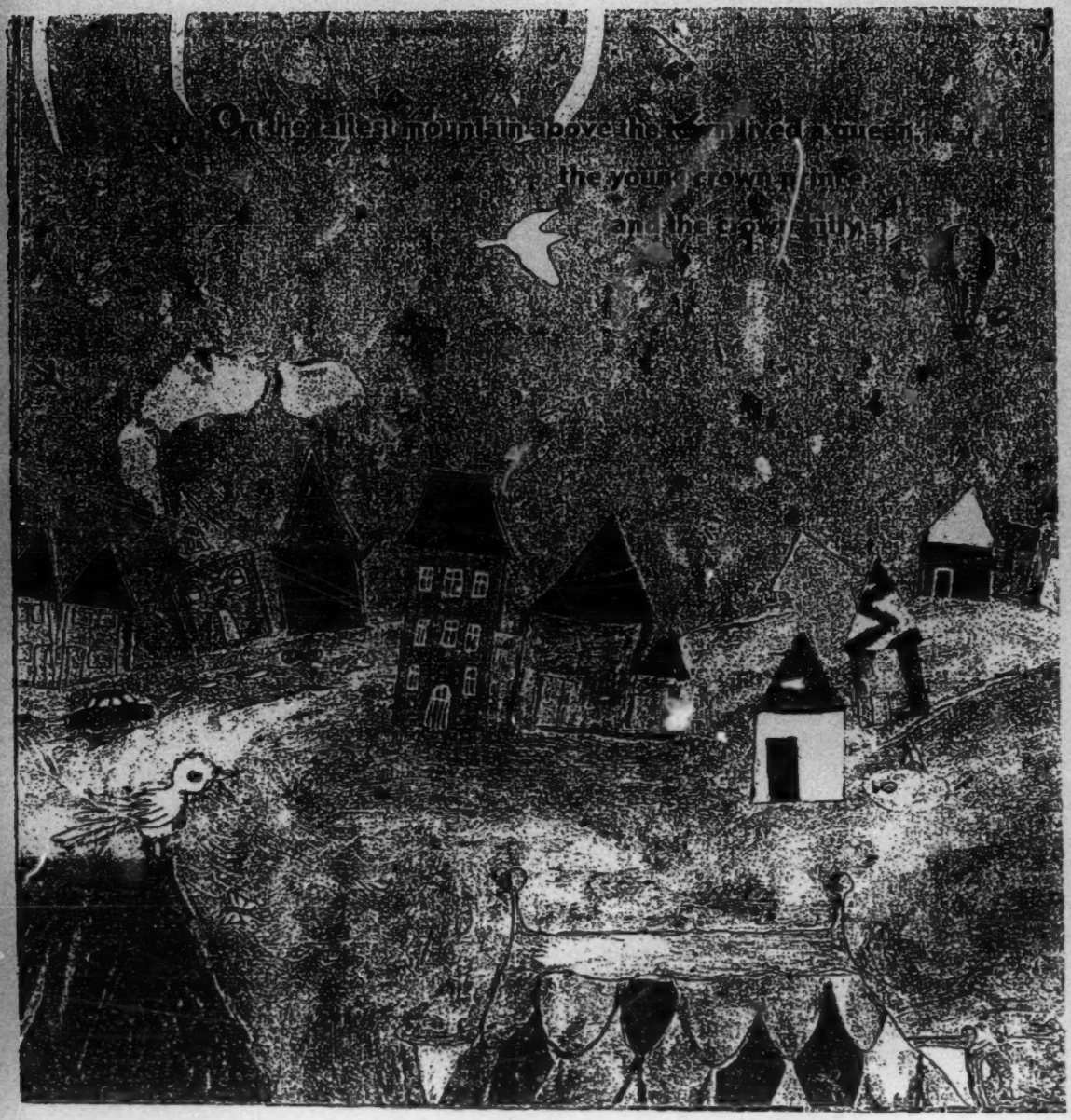
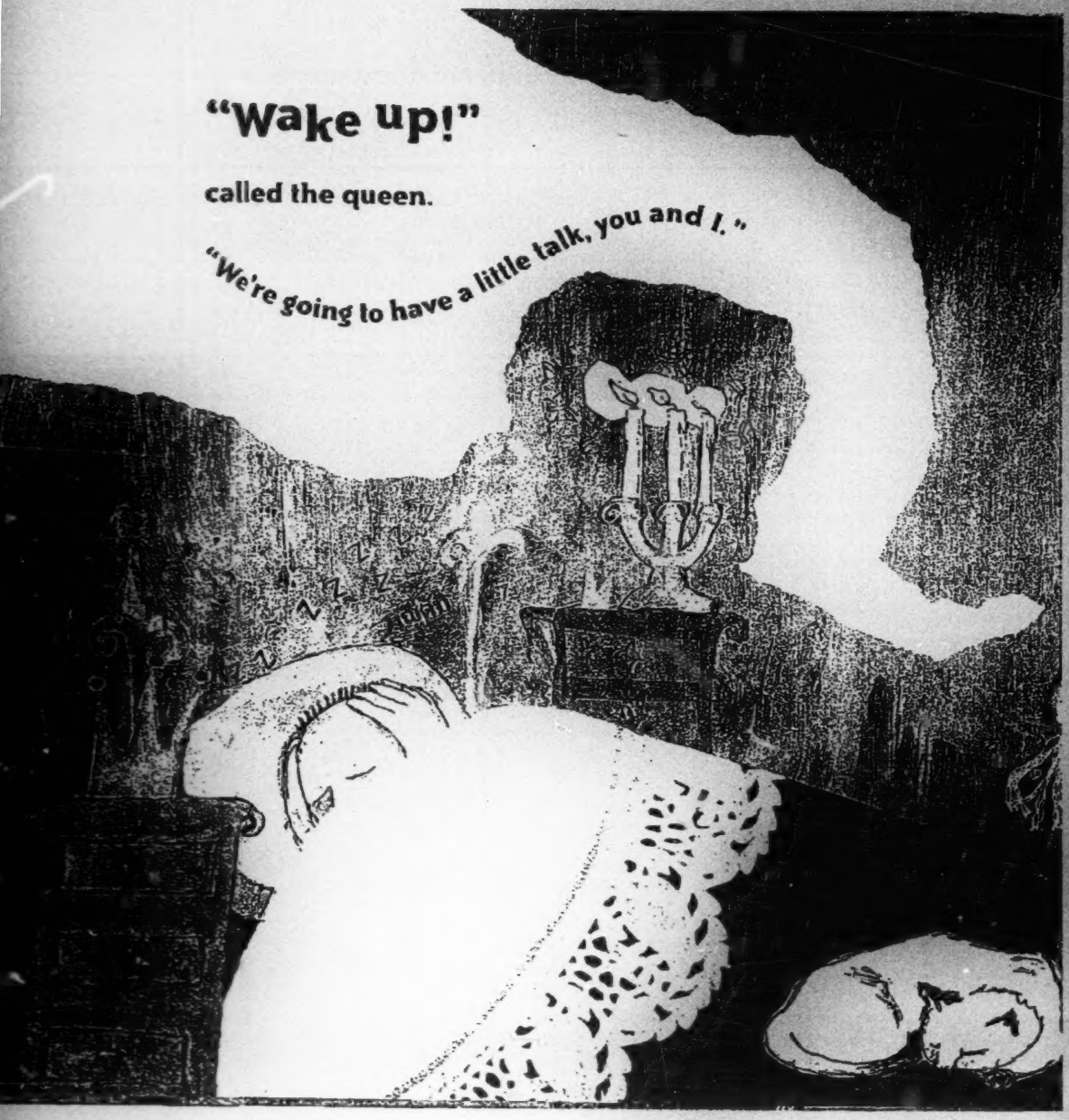
# King & King

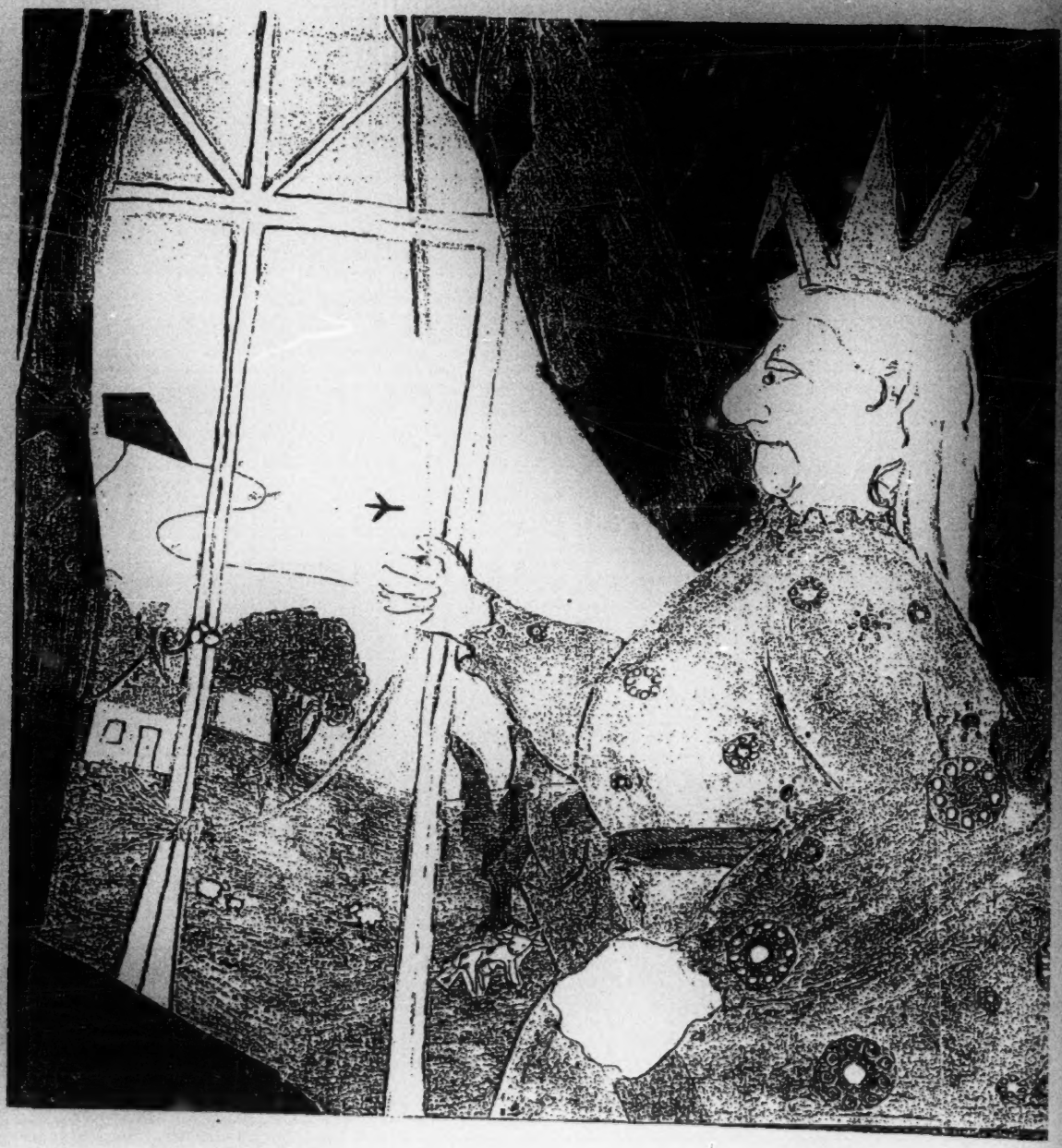
**Linda de Haan & Stern Nijland**

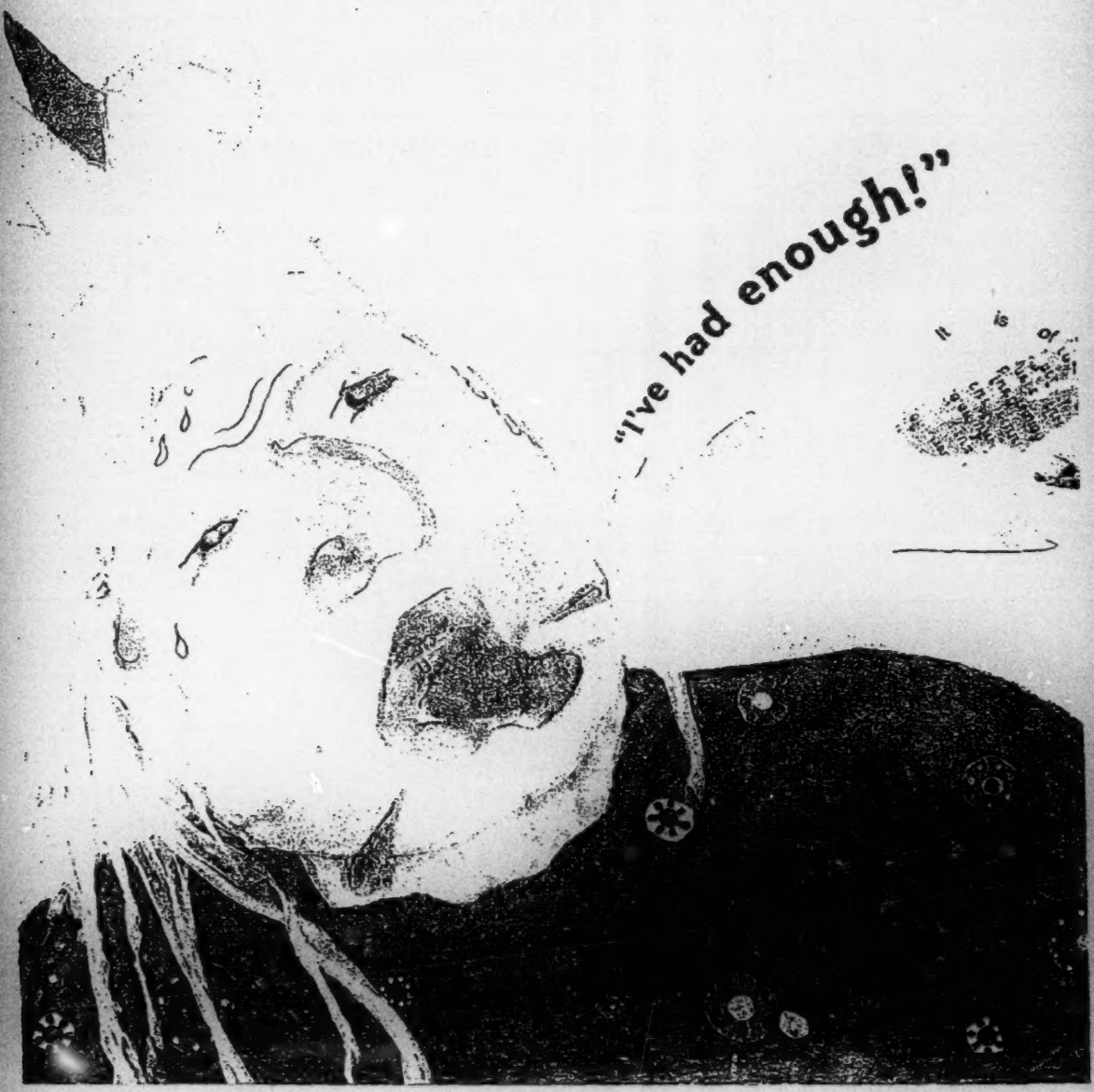
**Tricycle Press**
Berkeley/Toronto

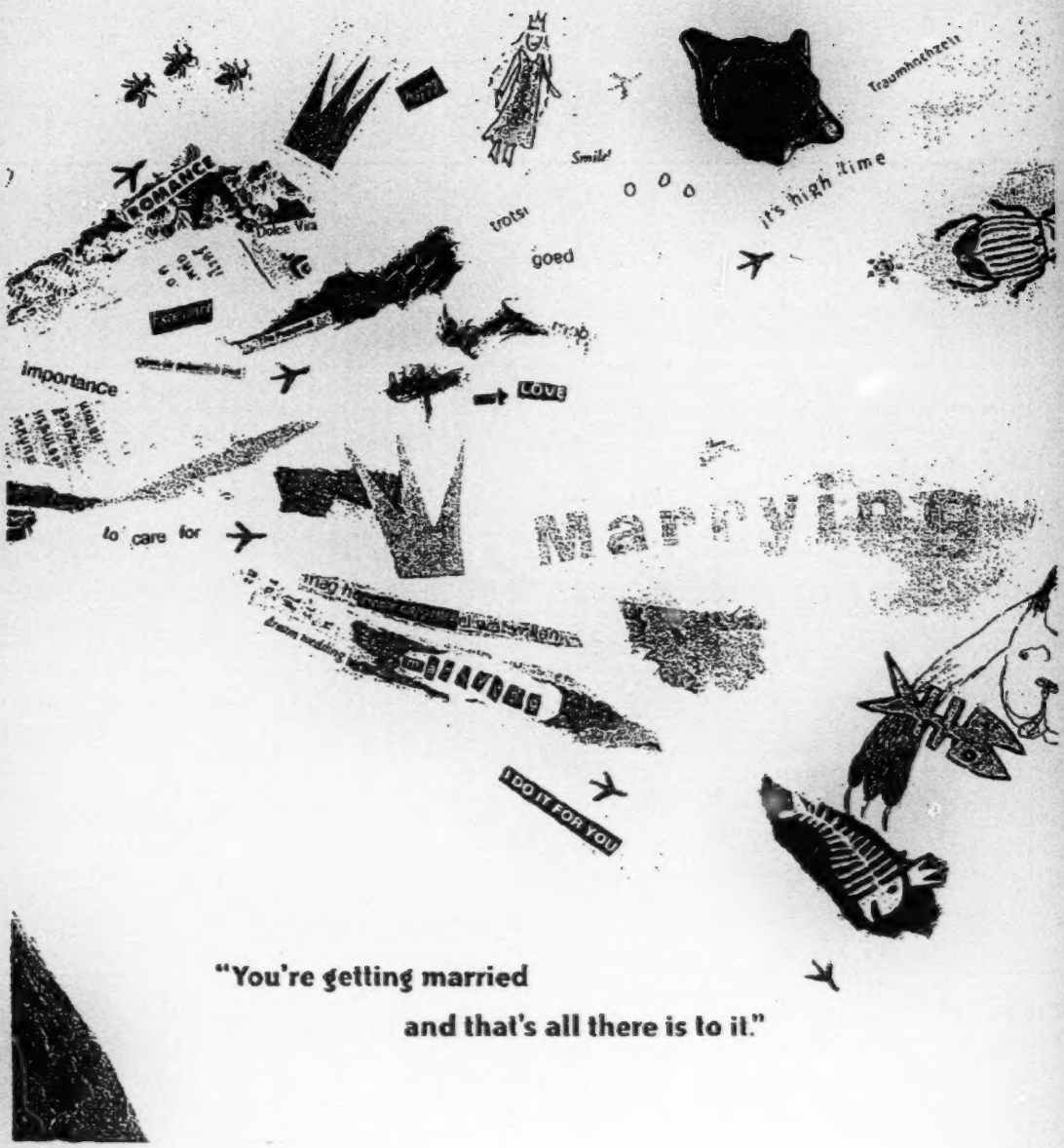

On the tallest mountain above the town lived a queen,
the young crown prince
and the crow king.

01
many long years and she was tired of it.
that the prince would marry
and become king before
the end of the summer.


"Wake up!"
called the queen.
"We're going to have a little talk, you and I."




"I've had enough!"



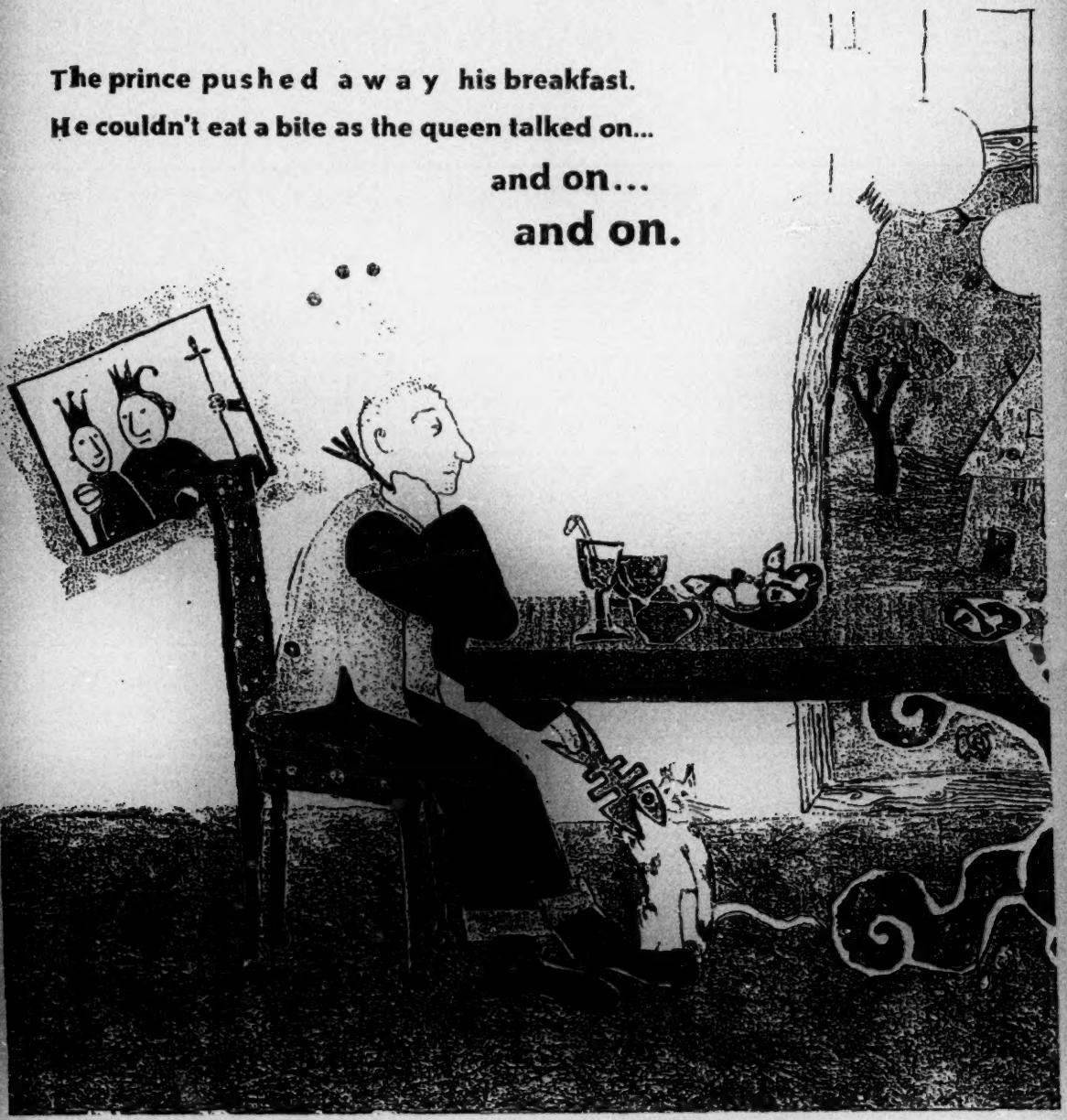

**"You're getting married**
**and that's all there is to it."**

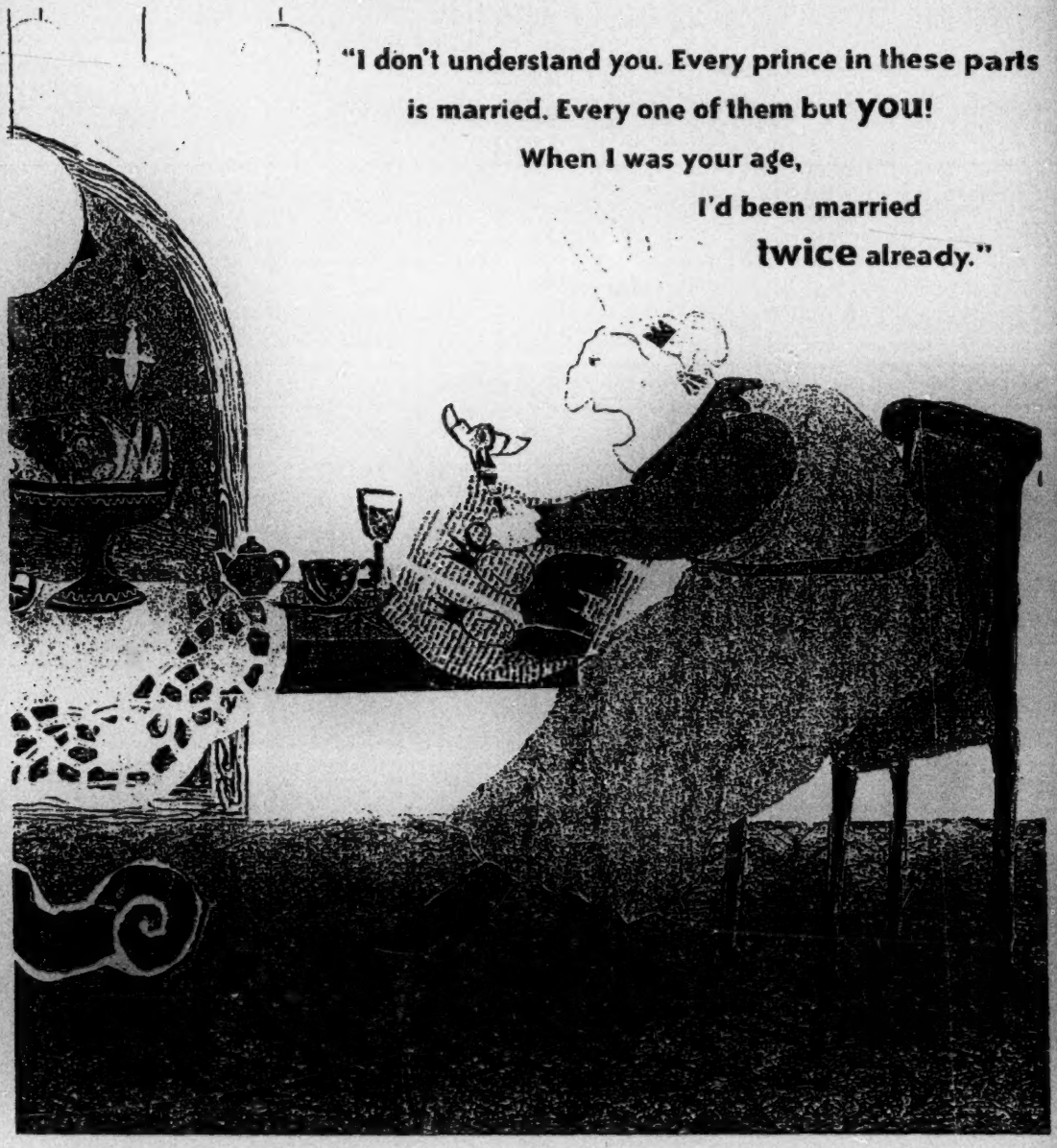
The prince pushed away his breakfast.

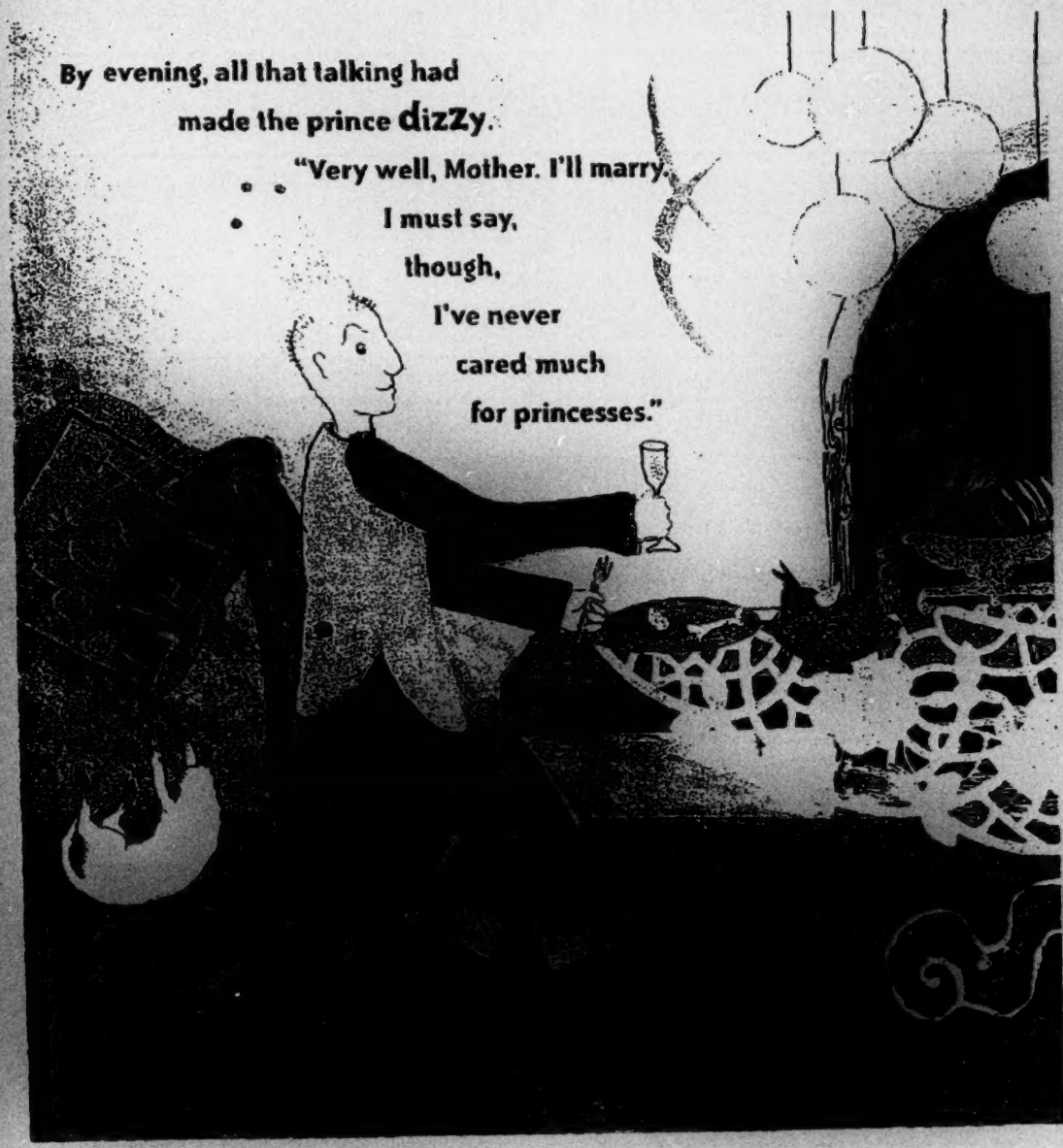
He couldn't eat a bite as the queen talked on...

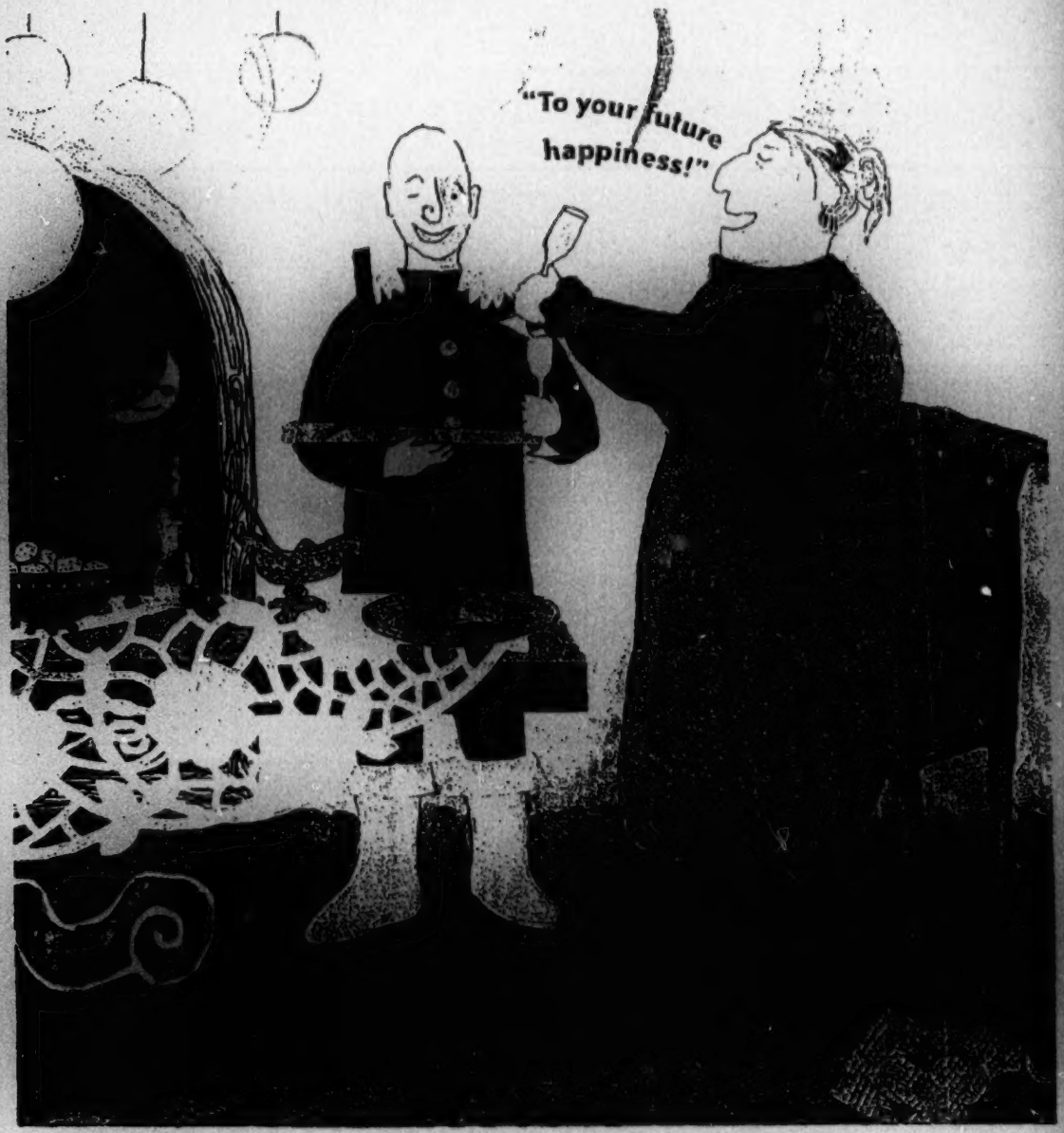
and on...

and on.




"I don't understand you. Every prince in these parts is married. Every one of them but you!
When I was your age,
I'd been married
twice already."


By evening, all that talking had
made the prince dizzy.
"Very well, Mother. I'll marry.
I must say,
though,
I've never
cared much
for princesses."

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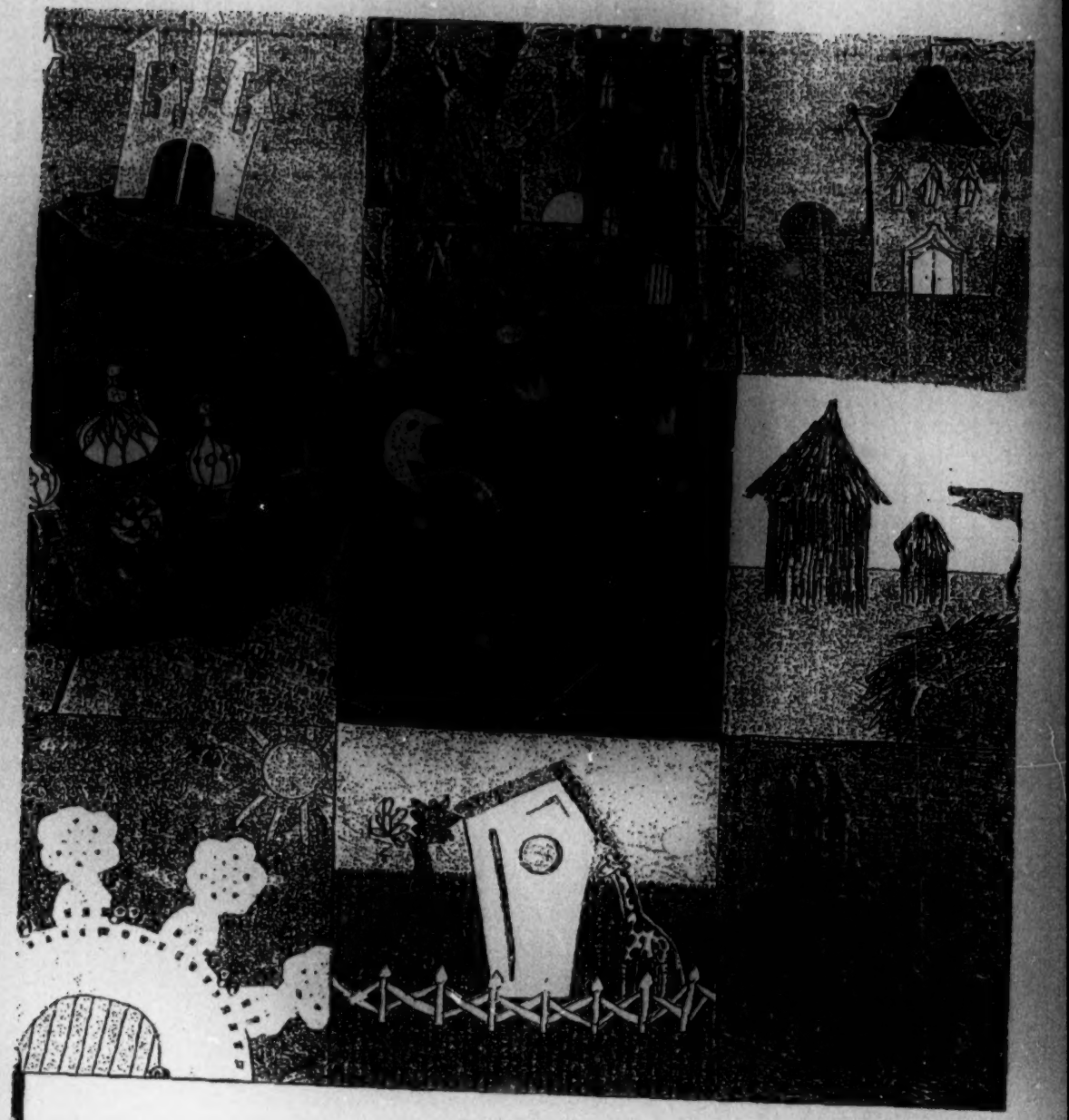

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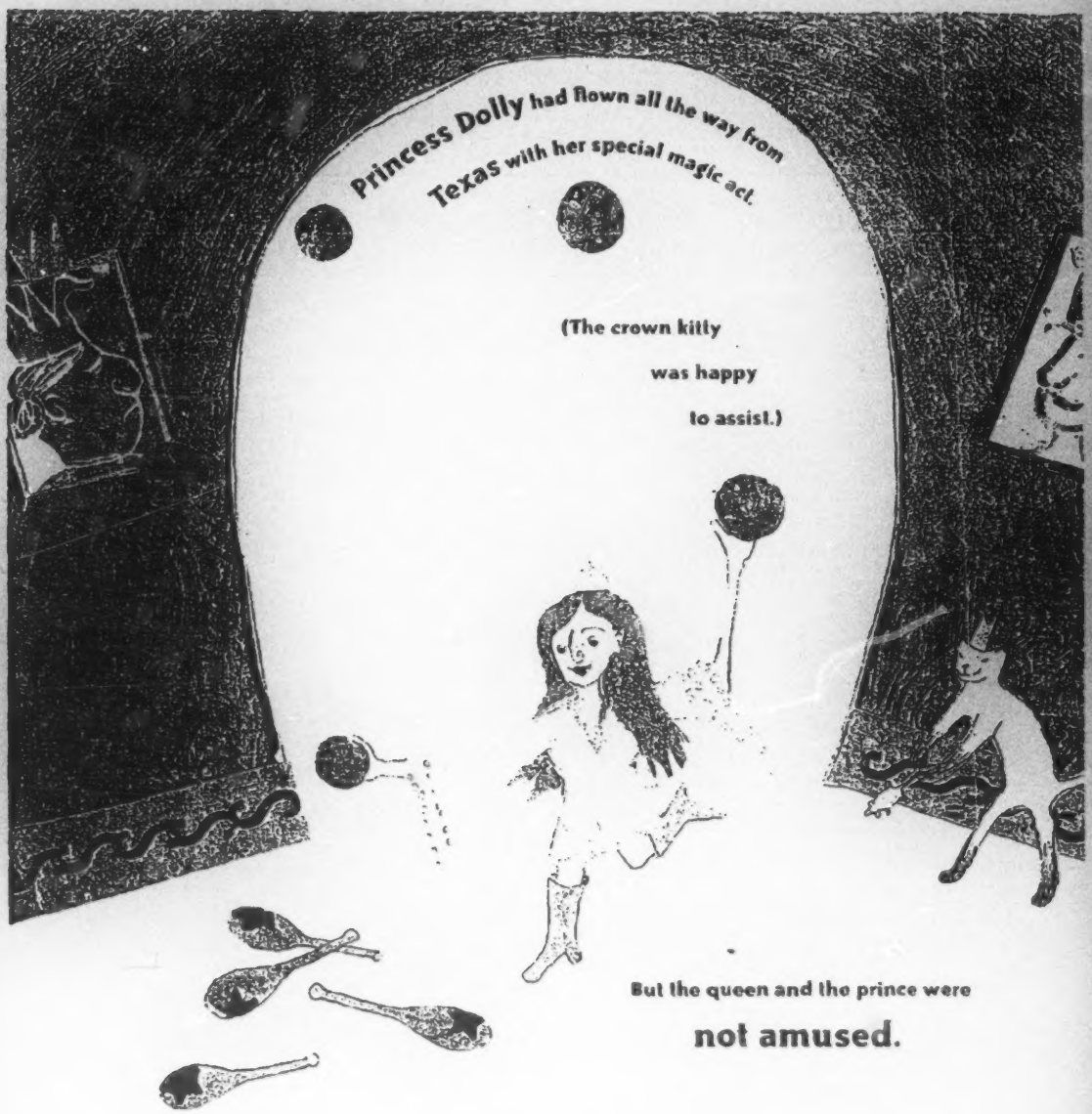
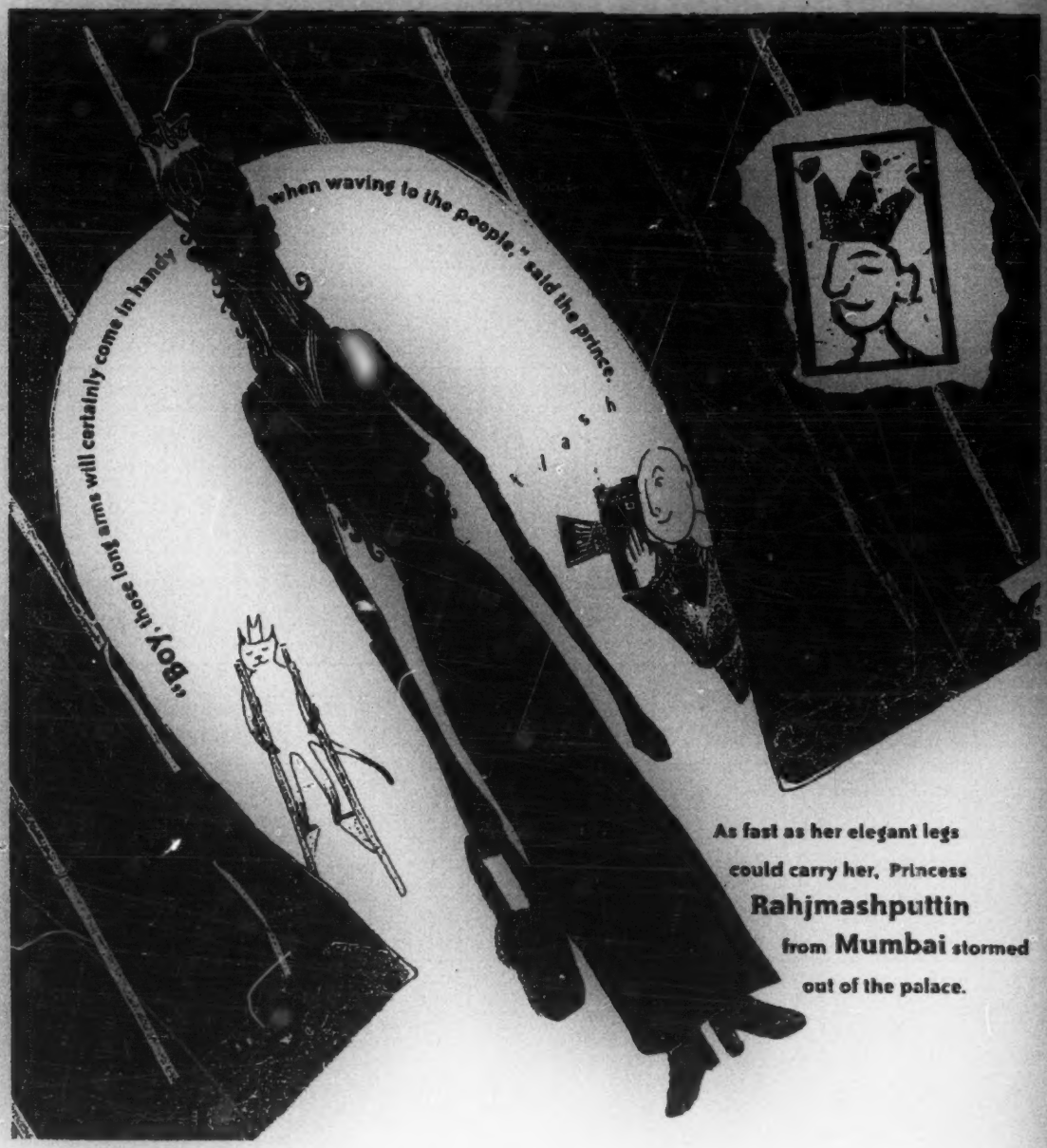
Princess Aria from Austria sang a thunderous opera for the prince.
No sooner had she finished than she was shown the door.


Princess Dolly had flown all the way from Texas with her special magic act.
(The crown kitty was happy to assist.)
But the queen and the prince were not amused.

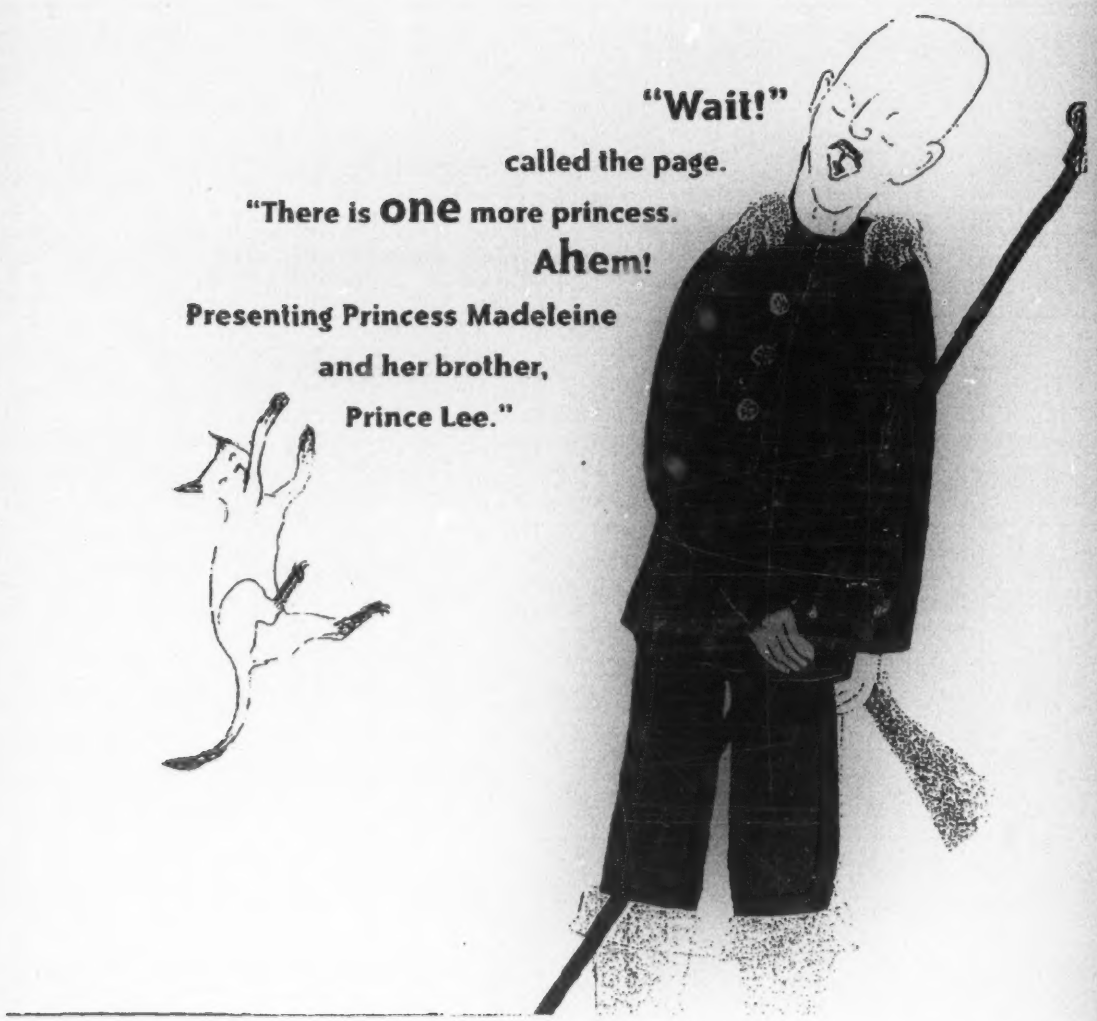
Next came the funny little princess from Greenland.
The prince didn't hit it off with her either,
so he really didn't mind
when his page promptly
fell in love with her.



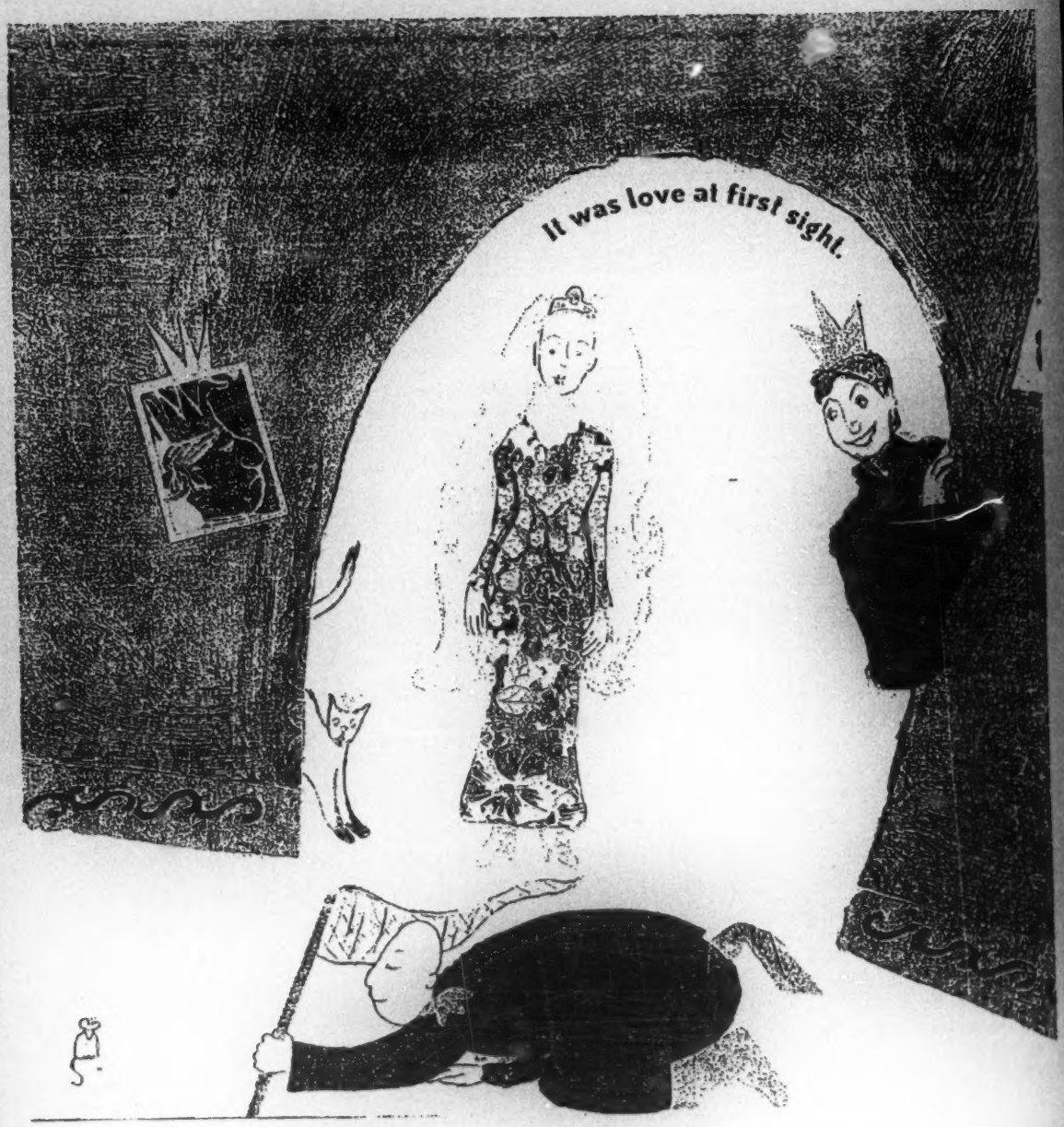

As fast as her elegant legs could carry her, Princess **Rahjmashputtin** from **Mumbai** stormed out of the palace.

The queen and the prince looked at one another sadly.

None of this was quite what they had expected.


"Wait!"
called the page.
"There is one more princess.
Ahem!
Presenting Princess Madeleine
and her brother,
Prince Lee."

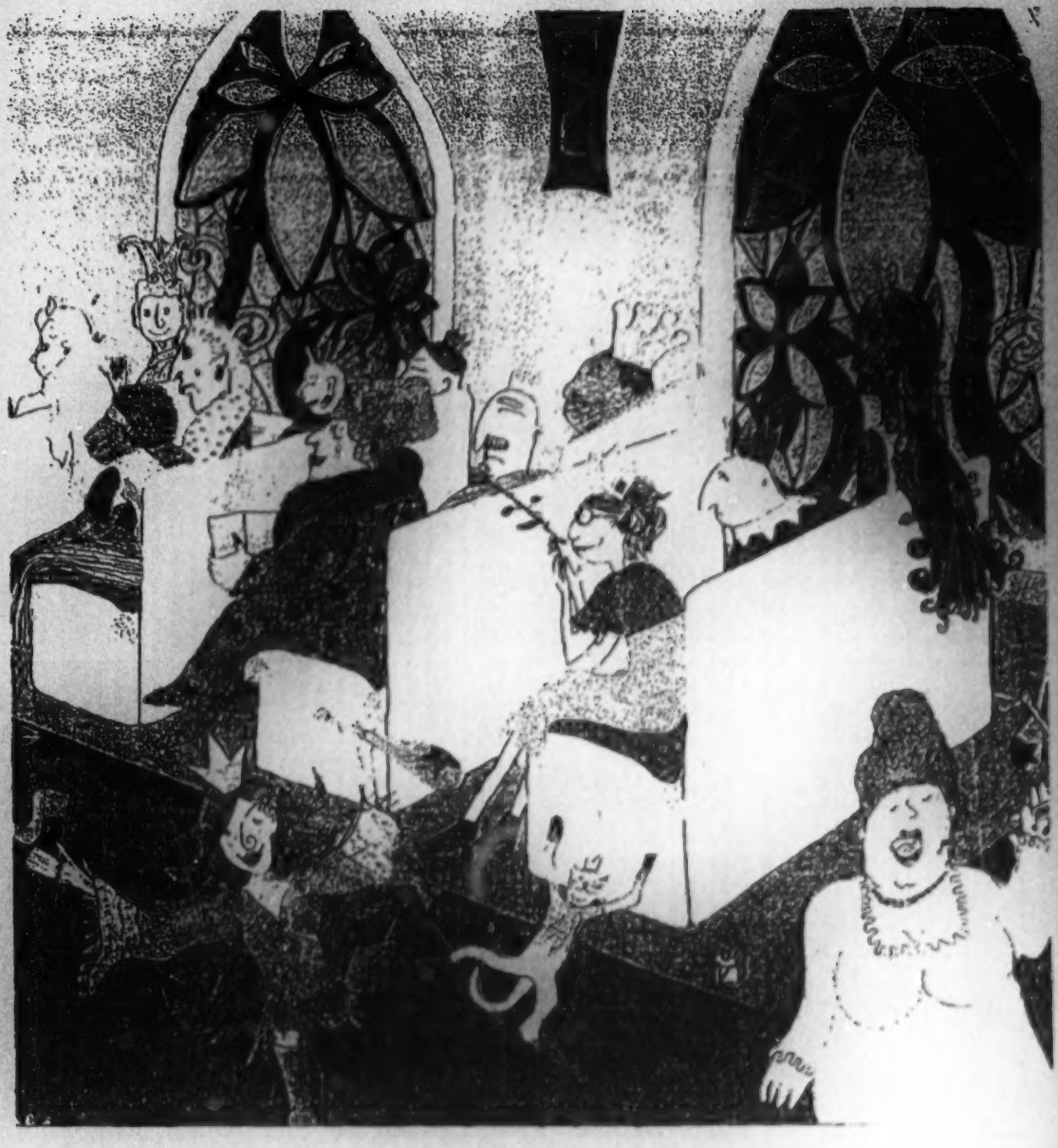
At last, the prince felt a stir in his heart.


It was love at first sight.

"What a wonderful
prince!"

"What a wonderful
prince!"

The wedding was very special.
The queen even shed a tear or two.



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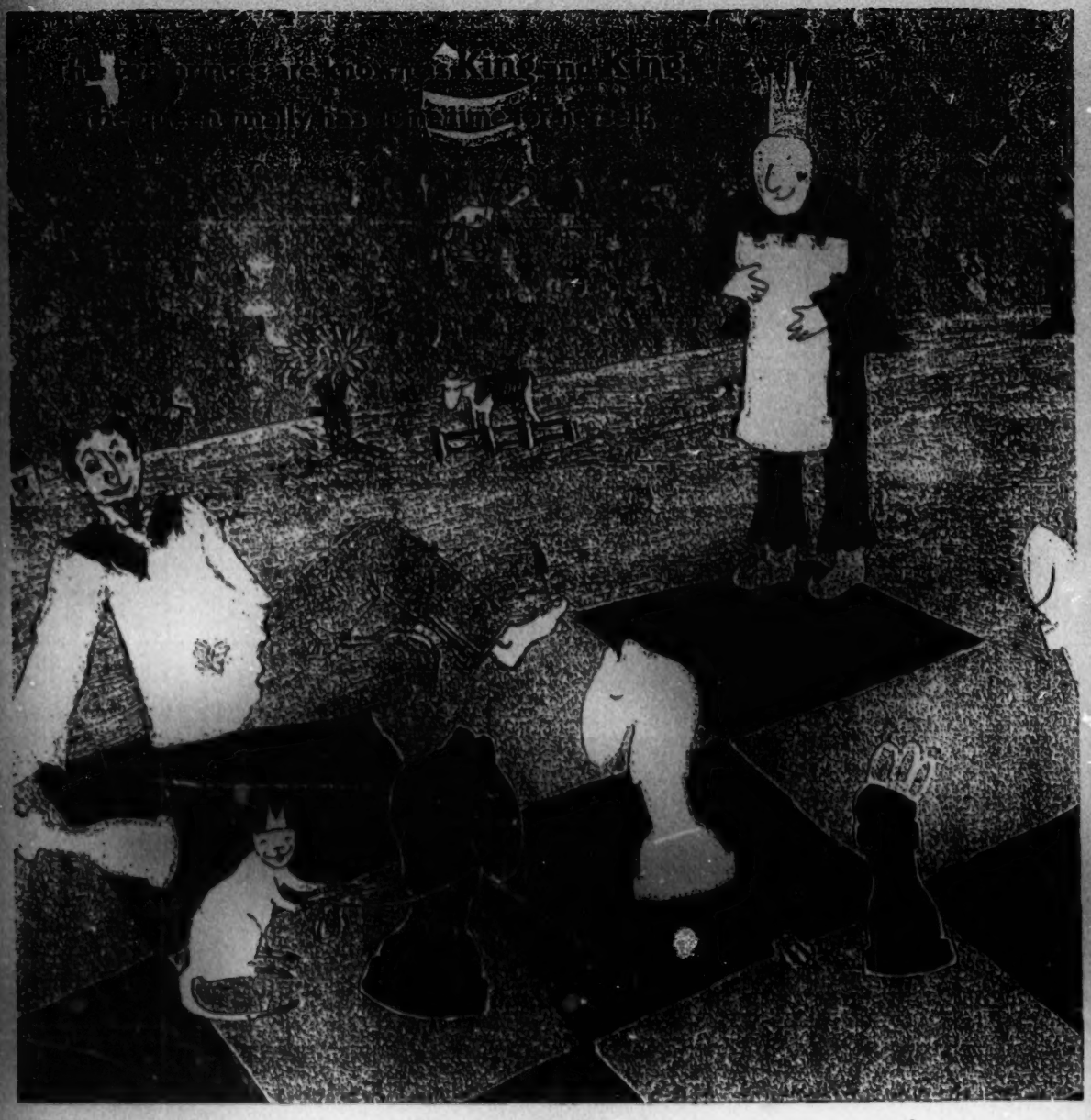

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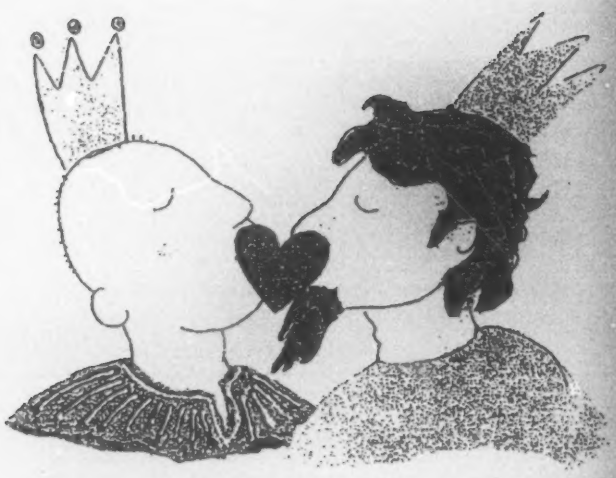
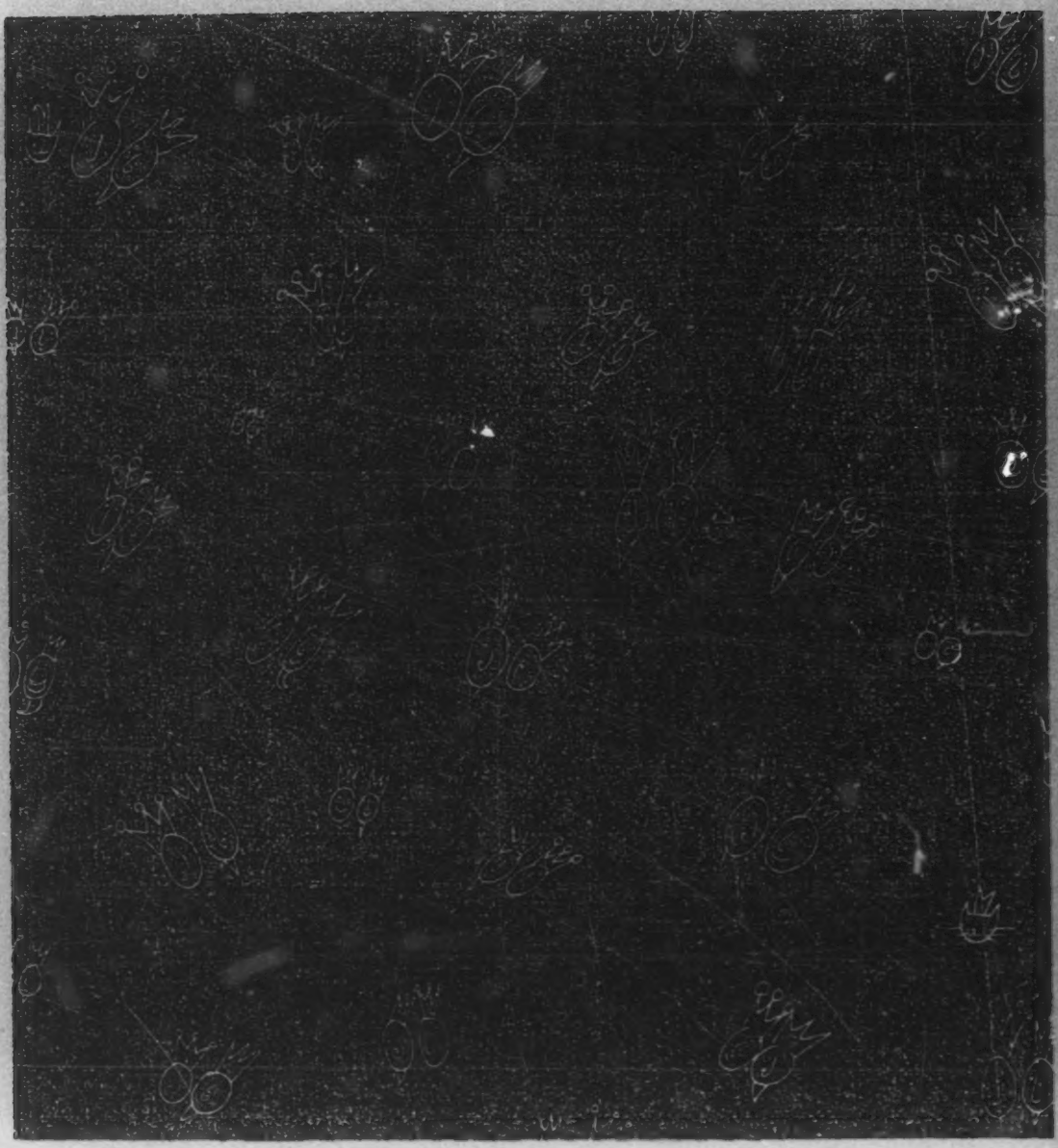
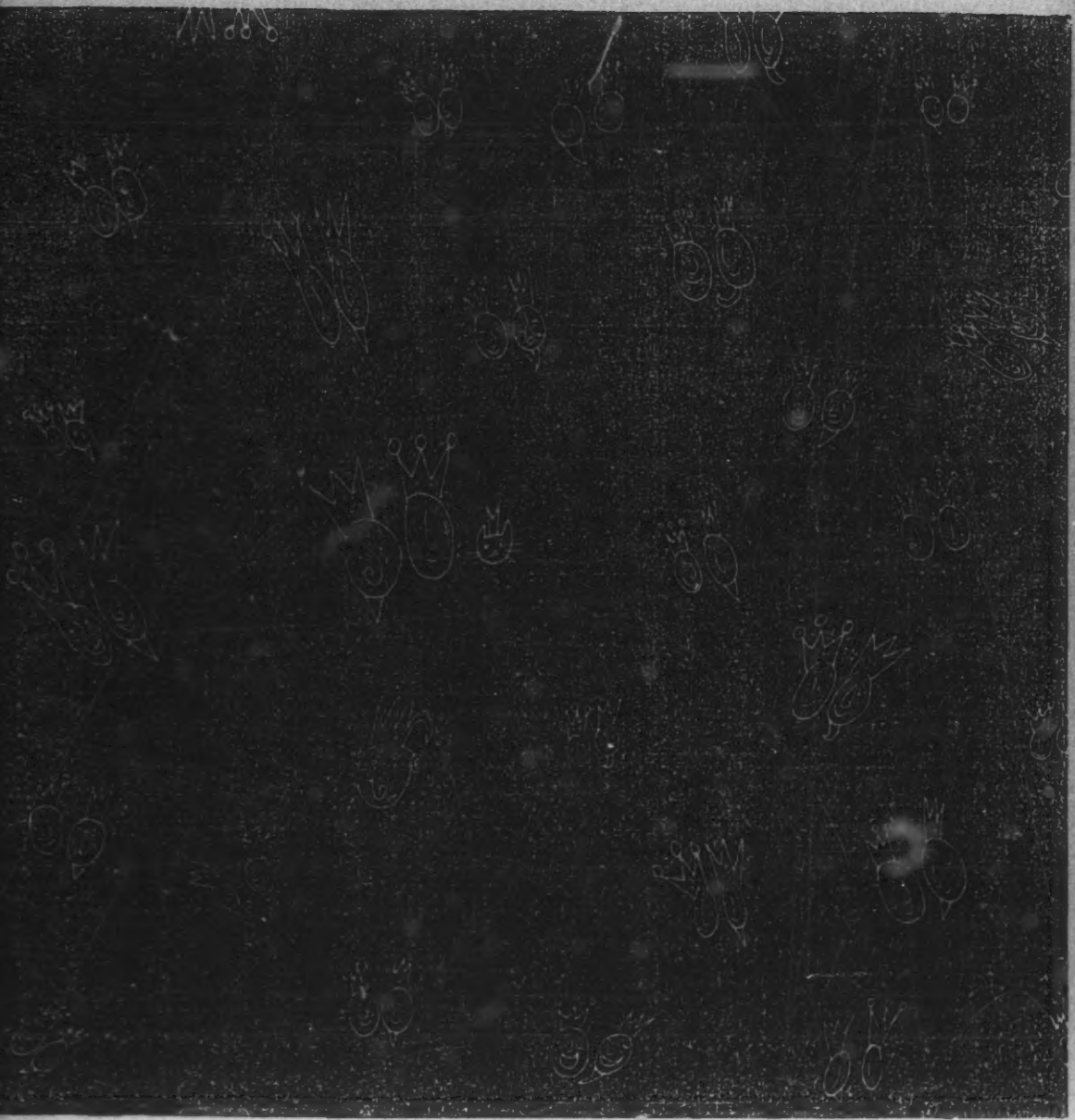
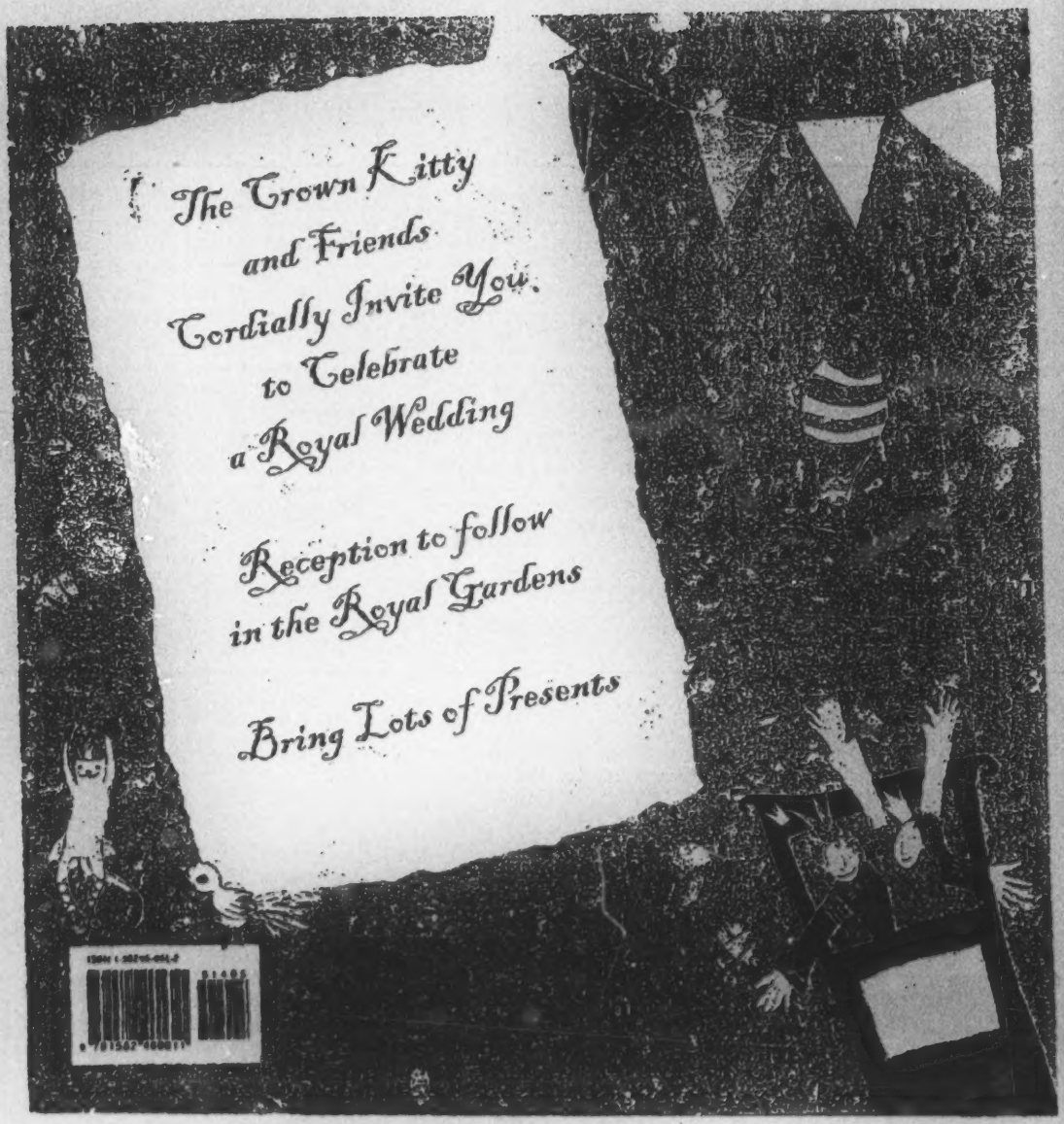
And everyone lives happily ever after








The Crown Kitty
and Friends
Cordially Invite You
to Celebrate
a Royal Wedding
Reception to follow
in the Royal Gardens
Bring Lots of Presents

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1368

IN THE

# Supreme Court of the United States

DAVID PARKER; TONIA PARKER; JOSHUA PARKER; JACOB PARKER; JOSEPH ROBERT WIRTHLIN; ROBIN WIRTHLIN; JOSEPH ROBERT WIRTHLIN, JR.,

*Petitioners,*

*v.*

WILLIAM HURLEY; PAUL B. ASH; HELEN LUTTON; THOMAS R. DIAZ; OLGA GUTTAG; SCOTT BURSON; ANDRE RAVENELLE; JONI JAY; JENNIFER WOLFRUM; HEATHER KRAMER; TOWN OF LEXINGTON; THOMAS GRIFFITH,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Whether the First Circuit Court of Appeals erred in affirming the dismissal of petitioners' Complaint by the District Court below, on the grounds that petitioners failed to allege sufficient facts in support of their claims of constitutional violations.

II. Whether respondents' use of books in a public elementary school depicting same-sex couples and families placed an unconstitutional burden on petitioners' rights under the Free Exercise Clause of the First Amendment and/or violated petitioners' substantive due process rights as protected under the Fourteenth Amendment.

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## STATEMENT OF THE CASE

### I. Statement of the Facts

Massachusetts prohibits public schools and other programs of study from discriminating against students on the basis of sex or sexual orientation. M.G.L. c. 76, § 5; 603 C.M.R. § 26.03. Following adoption of the Education Reform Act of 1993 (M.G.L. c. 71, §§ 1, *et seq.*), the Massachusetts Commissioner of Education (as directed by the Board of Education) developed academic standards and curriculum frameworks designed "to inculcate respect for the cultural, ethnic and racial diversity of the commonwealth . . . and to avoid perpetuating gender, cultural, ethnic or racial stereotypes." M.G.L. c. 69, §§ 1D & 1E; 603 C.M.R. § 26.05(1). The standards and frameworks developed by the Commissioner encourage instruction that describes "different types of families," as well as "the concepts of prejudice and discrimination," all under a Guiding Principle that celebrates the capacity of students, families and staff to work together toward the creation of a "safe and supportive environment where individual similarities and differences are acknowledged." These statewide standards do not purport to mandate the use of any particular instructional materials. Rather, they are intended as a guide to assist in the selection process. M.G.L. c. 69, § 1E; *Parker v. Hurley*, 514 F.3d 87, 91 (1st Cir. 2008); (Petitioners' Appendix [App.] A6).

In 2003, the Massachusetts Supreme Judicial Court held that a ban on same-sex marriage violates the equal protection principles of the state Constitution. *Goodridge v. Dep't of Public Health*, 440

Mass. 309, 344, 798 N.E.2d 941, 969-970 (2003). In so doing, the SJC cited (among other support) the statutory prohibition against public school discrimination (M.G.L. c. 76, § 5) as evidence of Massachusetts' "strong affirmative policy of preventing discrimination on the basis of sexual orientation." *Id.*, 440 Mass. at 341.

Petitioners, David and Tonia Parker, are the parents of Jacob and Joshua Parker. The Parkers describe themselves as "devout Judeo-Christians" (App. A8 & C8), who sincerely believe that marriage is a union between a man and a woman *only*, and "that labeling marriage to be otherwise is immoral." (App. A8 & C9).

In September 2004, the Parkers enrolled their son Jacob in kindergarten at Estabrook Elementary School ("Estabrook"), a public school in the Town of Lexington, Massachusetts. (App. C8). During his kindergarten year, Jacob brought home from school Who's in a Family?, a book of illustrations that depicts different types of families, including children with parents of different genders, children with parents of the same gender, children with parents of different races, and a single parent family. (App. A8 & C8-C9).[1] This book was one of several contained in a "Diversity Book Bag" used by Lexington school officials "to strengthen the connections among our school population and build an atmosphere of tolerance and

---

[1] Both the District Court and the First Circuit considered the alleged objectionable books, by agreement of the parties, without converting respondents' Rule 12(b)(6) motion into one for summary judgment. (App. A4).

respect for cultural racial ability and family structure diversity." (App. C8-C9).

The following academic year, Jacob's first grade reading center at Estabrook included Who's in a Family? among its collection, as well as Molly's Family, a book that teaches about different kinds of families by focusing on a kindergarten student whose parents are a same-sex couple. (App. A9 & C9). The Parkers maintain that the idea or "notion" depicted in these two books – *i.e.*, "the interchangeability of male and female within a marriage construct" – interferes with their sincerely-held religious beliefs as protected under the First Amendment to the United States Constitution (App. C9-C10), and that the public school's refusal either to give them prior notice of its intent to use the books and/or to allow their son to "opt out" of that portion of the curriculum, violates their parental rights, as protected under the Due Process Clause of the Fourteenth Amendment, to raise their children in accordance with those beliefs. (App. C12-C13, & C27-C28).

Petitioners, Joseph and Robin Wirthlin, are the parents of Joey Wirthlin. The Wirthlins, like the Parkers, describe themselves as "devout Judeo-Christians." (App. A8 & C23). Among the Wirthlins' "core beliefs" is the concept that issues concerning sexual intimacy and the holy basis of matrimony are governed by the laws of the God of Abraham and should remain private within the family. Included in that concept is the belief that homosexual behavior "is immoral in that it violates God's law." (App. C24).

On March 24, 2006, while Joey Wirthlin was enrolled in the second grade at Estabrook, his teacher, the respondent, Heather Kramer, read aloud to the class a library book entitled King & King. (App. A10 & C23). As described by the First Circuit:

> This picture book tells the story of a prince, ordered by his mother to get married, who first rejects several princesses only to fall in love with another prince. A wedding scene between the two princes is depicted. The last page of the book shows the two princes kissing, but with a red heart superimposed over their mouths. (App. A10, D1-D35).

The Wirthlins assert that the theme of King & King is not one they wish to have "celebrated and affirmed" to their son "because it is in contravention of their sincerely and deeply held faith." (App. C24). Further, respondents' use of King & King allegedly intrudes upon the Wirthlins' rights "to direct the moral upbringing of their own children." (App. C24).

## II. The Proceedings Below

Objecting to their children's exposure to books that reference or depict same-sex families, petitioners filed suit against respondents, the Town of Lexington and various public school officials, in the United States District Court for the District of Massachusetts ("District Court") on April 27, 2006. Petitioners' Complaint sounded in four counts. (App. C1-C34). In

Counts I and IV, petitioners sought relief for the alleged violation of their free exercise rights and substantive due process rights under 42 U.S.C. § 1983. In Counts II and III, petitioners sought relief under state law.

On August 15, 2006, respondents moved to dismiss petitioners' Complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. (App. A12). After hearing oral arguments, the District Court granted respondents' motion on February 23, 2007. *Parker v. Hurley*, 474 F. Supp. 2d 261 (D. Mass. 2007); (App. B1-B37). In so doing, the District Court dismissed petitioners' federal civil rights claims with prejudice in reliance upon the First Circuit decision of *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525 (1st Cir 1995), *cert. den.*, 516 U.S. 1159, 116 S.Ct. 1044 (1996). Applying a rational basis test to petitioners' free exercise and substantive due process claims, the District Court found that respondents' use of same-sex reading materials in a public school setting, as a means of teaching the subjects of diversity and tolerance, was rationally-related to the legitimate governmental interests of preparing public school students for citizenship, eradicating past prejudice and "fostering an educational environment in which gays, lesbians, and the children of same-sex parents will be able to learn well." *Parker*, 474 F. Supp. 2d at 275; (App. B28-B30). The District Court also dismissed petitioners' state law claims without prejudice to be refiled, if petitioners desired, in state court. (App. A12). Petitioners appealed this decision to the First Circuit.

On January 31, 2008, the First Circuit upheld the dismissal below, "albeit on grounds different from the district court's reasoning." (App. A13). Specifically, the First Circuit declined to measure the challenged governmental action (respondents' use of same-sex reading materials in a public school) under *any* test – whether rational basis, compelling interest, or something in between – for the simple reason that petitioners failed to allege a burden on their constitutional rights. In other words, petitioners did not adequately plead a constitutional violation. Hence, the First Circuit regarded the appropriate level of justification for governmental action as "irrelevant." (App. A22).

In reaching its decision, the First Circuit did not apply a so-called "hybrid rights" analysis as urged by petitioners. Relying instead on *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526 (1972), as interpreted and preserved in *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595 (1990), the First Circuit considered petitioners' free exercise and due process claims "inter-dependently." (App. A21). The two interests, explained the Court, "overlap and inform each other, and thus are sensibly considered together." (App. A21). Accepting the allegations of their Complaint as true (as required under *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S.Ct. 1955, 1965 (2007)), the First Circuit considered petitioners' free exercise and substantive due process claims in tandem. The First Circuit concluded, however, that petitioners "do not allege facts that give rise to claims of a constitutional magnitude . . .." (App. A39). They made no showing of a coercive effect, whether direct or indirect, on their

free exercise of religion. (App. A35-A38). Nor did they identify a substantive due process right so broad that it encompassed the rights of parents to dictate the scope of their children's public school education. (App. A29-A30). Without pleading rights of constitutional dimensions, the petitioners, ruled the First Circuit, "are not entitled to a federal judicial remedy under the U.S. Constitution." (App. A40). Instead, petitioners' recourse for change is to pursue "the normal political processes . . . in the town and state." (App. A40). The First Circuit accordingly affirmed the dismissal below.

## REASONS FOR DENYING THE PETITION

### I. THERE IS NO SPLIT AMONG THE CIRCUITS AS TO WHETHER PARENTS LEAVE THEIR *MEYER-PIERCE* RIGHTS AT THE SCHOOLHOUSE DOOR; EVEN IF THERE IS SUCH A SPLIT, IT IS IMMATERIAL TO THE FIRST CIRCUIT DECISION BELOW.

Petitioners rely on *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571 (1925), as support for their Fourteenth Amendment substantive due process claims. In *Meyer*, the Supreme Court struck down a state statute prohibiting the instruction of foreign languages in any school on the grounds it unreasonably infringed upon the liberty interest of a parent "to give his children education suitable to their station in life . . .." *Meyer*, 262 U.S. at 400, 43 S.Ct. 625. In *Pierce*, the Supreme Court held unconstitutional a state statute that required

compulsory attendance at public schools, thereby outlawing parochial and private educational institutions. The statute, ruled the Court, unreasonably interfered with the liberty interests of parents and guardians "to direct the upbringing and education of children under their control." *Pierce*, 268 U.S. at 534-35, 45 S.Ct. 571. The Supreme Court later relied on *Meyer* and *Pierce* to invalidate a compulsory school attendance law as applied to Amish parents who refused on religious grounds to send their children to public school. *Yoder,* 406 U.S. at 232-33, 92 S.Ct. 1526.

The above school cases "evince the principle that the state cannot prevent parents from choosing a specific educational program . . .."

> That is, the state does not have the power to "standardize its children" or "foster a homogenous people" by completely foreclosing the opportunity of individuals and groups to choose a different path of education.

*Brown*, 68 F.3d at 533, citing *Meyer*, 262 U.S. at 402, 43 S.Ct. 625. *Meyer* and *Pierce* do not, therefore, support petitioners' insistence that parents may selectively shield their children from exposure to certain books or materials that may be used in public school, but which the parents find objectionable. *Pierce* lends "no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society . . .." *Yoder*, 406 U.S. at 239, 92 S.Ct. 1526 (White, J., concurring). Indeed, the First Circuit described as

"well recognized" the general proposition that, "while parents can choose between public and private schools, they do not have a constitutional right to 'direct *how* a public school teaches their child.'" (App. A28, citing *Blau v. Fort Thomas Public School Dist.*, 401 F.3d 381, 395 (6th Cir. 2005)).

In support of an argument that their *Meyer-Pierce* rights are broader than the First Circuit recognized, petitioners claim that the Third Circuit's opinion in *C.N. v. Ridgewood Bd. of Ed.*, 430 F.3d 159 (3rd Cir. 2005), illustrates a split with the Ninth Circuit's opinion in *Fields v. Palmdale School Dist.*, 427 F.3d 1197 (9th Cir. 2005), amended by 447 F.3d 1187 (9th Cir. 2006) (*en banc*), *cert. den.*, 127 S.Ct. 725 (2006). That split, petitioners claim, is evidenced by the following footnote in *C.N.*:

> [W]e do not hold, as did the panel in *Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005), that the right of parents under the *Meyer-Pierce* rubric "does not extend beyond the threshold of the school door." *Id.* at 1207. Nor do we endorse the categorical approach to this right taken by the *Fields* court, wherein it appears that a claim grounded in *Meyer-Pierce* will now trigger only an inquiry into whether or not the parent chose to send their child to public school and, if so, then the claim will fail.

*C.N*, 430 F.3d at 185, n.26; (Petition for Writ of Certiorari [Petition], at 7-8).

A petition for a writ of certiorari will only be granted for compelling reasons. One such reason may be that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . .." Sup. Ct. R. 10(a). For the reasons discussed below, petitioners' argument – *i.e.*, that this Court should grant a writ of certiorari to the First Circuit because of a perceived conflict between two decisions of the Third and Ninth Circuits – must fail.

### A. No Conflict Exists Between the Third and Ninth Circuits.

Despite petitioners' assertions, the *C.N.* and *Fields* decisions are reconcilable. Both cases involve the substantive due process rights of privacy and to direct the upbringing of one's children in the context of surveys conducted of public school students. Moreover, in both cases, the Circuit Courts, following the principles enunciated in *Meyer* and *Pierce,* upheld the right of a public school to conduct a student survey over the objections of parents. See *C.N.*, 430 F.3d at 185 (administration of survey to seventh through twelfth grade students regarding "sensitive topics" held not an unconstitutional intrusion on parental decision-making authority);[2] *Fields*, 427 F.3d at 1206-

[2] The survey, entitled "Profiles of Student Life: Attitudes and Behaviors," was administered in the Ridgewood public school district in New Jersey. "The survey sought information about students' drug and alcohol use, sexual activity, experience of physical violence, attempts at suicide, personal associations and relationships (including the parental relationship), and views on matters of public interest." *C.N.*, 430 F.3d at 161.

1207 (providing sexual information to elementary school children held not a violation of parents' constitutional rights to direct upbringing of their children).

The Third and Ninth Circuits' interpretations of *Meyer* and *Pierce* are mirrored in numerous other Circuit decisions, including those of the First Circuit. See *Brown*, 68 F.3d at 534 (" . . . the rights of parents as described by *Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools"); *Leebaert v. Harrington*, 332 F.3d 134, 141 (2nd Cir. 2003) (upholding middle school's refusal to exempt seventh-grade student from mandatory health education course); *Littlefield v. Forney Ind. School Dist.*, 268 F.3d 275, 289 (5th Cir. 2001) (enforcement of mandatory school uniform policy upheld against challenge that it violated "fundamental right of filiation and companionship with one's children"); *Blau*, 401 F.3d at 393-394 (upholding middle school's refusal to exempt twelve-year old student from mandatory dress code); *Swanson v. Guthrie Ind. School Dist. No. I-L*, 135 F.3d 694, 699 (10th Cir. 1998) ("parents have a constitutional right to direct [their daughter's] education, up to a point"). See also *Myers v. Loudoun Cty. School Bd.*, 251 F. Supp. 2d 1262, 1275-76 (E.D.Va. 2003), *aff'd*, 418 F.3d 395 (4th Cir. 2005) ("[t]he fundamental right to raise one's children as one sees fit is not broad enough to encompass the right to re-draft a public school curriculum.")

Arguably, the Ninth Circuit's statement that "the *Meyer-Pierce* right does not extend beyond the threshold of the school door" can be viewed as

intemperate if interpreted to mean that parents lose *all* rights once their children enter public school. (Petition, at 7). But that construction is neither warranted nor justified by the Ninth Circuit's ruling. Whatever the parameters of parents' substantive due process rights, the *Fields* decision stands for the proposition that they do not encompass the right "to override the determinations of public schools as to the information to which their children will be exposed while enrolled as students." *Fields*, 427 F.3d at 1200.[3] The Third and Ninth Circuits are in complete agreement on this point. In fact, the First Circuit cited both the Third and Ninth Circuits in support of its decision to affirm the dismissal of petitioners' Complaint. (App. A28-A29). No conflict between the Third and Ninth Circuits warrants Supreme Court review.

If the *Fields* decision did indeed signal a departure from pre-existing constitutional case law, as petitioners suggest, the Supreme Court had an

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[3] The Ninth Circuit subsequently clarified its ruling after a rehearing *en banc*. The issue before the Court was not whether parents have *no* substantive due process rights in the public schools, but whether such rights – however defined – permit parents to limit or restrict the *information* provided to their children in public school. The *Fields* Court ruled they do not.

> Our opinion holds in essence that the Constitution does not afford parents a substantive due process or privacy right to control through the federal courts the information that public schools make available to their children. What information schools provide is a matter for the school boards, not the courts to decide.

*Fields*, 447 F.3d at 1190.

opportunity to correct that deviation when the parents in *Fields* filed a petition for a writ of certiorari with this Court. Yet, the Supreme Court declined to grant that petition. Without presuming to assign undue weight to that denial, it can, at the very least, lend no support to petitioners' argument that a conflict exists between the Third and Ninth Circuits on the same important matter. And, at the most, this Court's denial of certiorari in *Fields* coincides with respondents' view that the Third and Ninth Circuits are in alignment.

### B. Even if a Conflict Exists Between the Third and Ninth Circuits, Such Conflict was Immaterial to the First Circuit Decision Below.

Tellingly, with respect to the scope of parents' *Meyer-Pierce* due process rights, petitioners do not argue that the First Circuit's decision contributed to or reflects the perceived conflict among the Circuits, or that such conflict influenced, in any way whatsoever, the First Circuit's decision to affirm the dismissal of petitioners' Complaint. As set forth above, the First Circuit cited *Fields* and *C.N.* as two cases standing for the same proposition – *i.e.*, that parents do not have a constitutional right to direct how a public school may teach their children. (App. A28-A29). The First Circuit then applied *Meyer-Pierce* to hold that the Parkers and Wirthlins lack the constitutional right to direct their children's public schooling by controlling the content of the reading materials to which their children are exposed. The First Circuit analysis is consistent with the analysis employed by both the Ninth and Third

Circuits in *Fields* and *C.N.*, respectively, and is entirely appropriate.

The First Circuit did not hold that parents leave their *Meyer-Pierce* rights at the schoolhouse door, as that issue was never reached. In fact, the First Circuit made no mention of petitioners' overly-broad interpretation of *Fields*. Even if the Ninth Circuit is of the opinion that parents relinquish all substantive due process rights at the schoolhouse door (a gross misinterpretation of *Fields*), such an opinion has nothing to do with this case. Therefore, issuing a writ of certiorari to the First Circuit based on the alleged split between *Fields'* limitation on parental substantive due process rights and *C.N.'s* disapproval of that limitation would be futile.

## II. PETITIONERS DO NOT PRESENT A HYBRID RIGHTS CASE.

Petitioners further argue that the Supreme Court should grant a writ of certiorari in order to resolve a split among the Circuits regarding the so-called "hybrid rights" doctrine, which can be traced to *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595 (1990); (Petition, at 25-28). In *Smith*, the Court acknowledged that the case before it did not involve "the Free Exercise Clause in conjunction with other constitutional protections . . . " and, in that way, was unlike several earlier decisions including, but not limited to, *Pierce* and *Yoder*. *Smith*, 494 U.S. at 881 & n.1. In so noting, the *Smith* Court hinted (but did not hold) that such "hybrid" situations might merit a higher level of

scrutiny than rational basis review. *Id.*, 494 U.S. at 882, 110 S.Ct. 1595.[4] Petitioners contend that they specifically pled a "hybrid rights" case in their Complaint by asserting "that their right to avoid moral and religious indoctrination of their very young children stems from a combination of due process rights enunciated in the Free Exercise clause, the fundamental right of parents to raise their children, and the rights of privacy related to intimate family associations." (Petition, at 25). Thus, based on the apparently enormous controversy generated by the "hybrid rights" doctrine, and the decisions citing and discussing its application, petitioners urge the Supreme Court to use this opportunity to "explain" the doctrine and resolve a split among the Circuits. (Petition, at 25-27).

Even if the Supreme Court should someday choose to clarify the meaning of the "hybrid rights" exception, this is not the case in which to do so. In their Complaint, petitioners pled neither a free exercise claim *nor* a substantive due process claim, let alone a combination of the two. While noting the ongoing debate over the meaning and application of "hybrid rights" in terms of its status as a separate doctrine, the requisite strength of the companion right, and the level of scrutiny to be applied to the combination, the First Circuit found no need to join the fray in order to analyze petitioners' claims. (App. A18-

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[4] The First Circuit pointed out, however, that "[n]o published circuit court opinion . . . has ever applied strict scrutiny to a case in which plaintiffs argued they had presented a hybrid claim." (App. A20). Such unanimity augurs against granting Supreme Court review here.

A22). *Yoder* survived *Smith*; that much is certain. (App. A20-A21). Thus, when the interests of parenthood are joined with a free exercise claim, it is appropriate, reasoned the First Circuit, to "approach the parents' claims as the Court did in *Yoder*" – *i.e.*, "interdependently." (App. A21). Petitioners do not quarrel with this logic but, nonetheless, urge this Court to grant certiorari so that it may "reiterate *Yoder's* vitality in a [post-*Smith*] world . . .." (Petition, at 23).

The First Circuit began its analysis of petitioners' interdependent rights by declining to apply *Smith's* rationality test. If petitioners' free exercise rights are subjected to a mere rationality test, then "this case," explained the First Circuit, "would easily be dismissed." (App. A14). Yet, *Smith's* "neutral" and "generally applicable" standard applies only where the challenged regulation or law either criminalizes certain conduct or requires respondents to take the actions that they took. (App. A18). Neither circumstance is present here. Nor did respondents' use of same-sex books in the classroom target religious groups, thereby requiring proof of a compelling justification. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546, 113 S.Ct. 2217 (1993); (App. A16).

The First Circuit went on to point out that, regardless of the test employed, *Smith* did not alter the standard constitutional threshold question when considering a free exercise claim: "whether the plaintiff's free exercise is interfered with at all." (App. A22). The Court then proceeded to answer that question in the negative. "In this case there is no

pleading of a constitutionally significant burden on plaintiffs' rights." (App. A23). Once again, petitioners' Complaint contained insufficient facts to demonstrate a burden, either through coercion or compulsion, on their free exercise of religion. (App. A38-A39).

With respect to petitioners' mutually dependent due process rights, the First Circuit found "substantial differences" between the claims of the Parkers and Wirthlins and the claims of the Amish parents in *Yoder*. (App. A24). Petitioners do not live in a largely separate culture. Exposure of their children to same-sex reading materials will not automatically and irreversibly prevent them from raising their children in the religious belief that gay marriage is immoral. Further, no criminal or other sanction prevents petitioners from educating their children as they see fit. Finally, whereas the Parkers and Wirthlins still retained options, the Amish parents were left with none. (App. A24). Citing the limitations of the *Meyer-Pierce* cases (which fail to recognize a constitutional right to "direct how a public school teaches their child" (App. A28)), as well as the irrelevance of their alleged familial privacy rights (which protect the rights to marry and procreate), the First Circuit rejected petitioners' substantive due process claims. "In sum, the substantive due process clause by itself, either in its parental control or its privacy focus, does not give plaintiffs the degree of control over their children's education that their requested relief seeks." (App. A30).

Whether viewed alone or "interdependently," petitioners' rights did not rise to a level of constitutional significance. The Parkers and Wirthlins did

not, as they maintain, plead the "quintessential" hybrid rights case. Without pleading either a free exercise claim or another constitutional protection, petitioners invoked no "combination" of rights to be tested under whatever constitutional analysis the language in *Smith* requires. The petition for a writ of certiorari should be denied.

## III. THE FIRST CIRCUIT DID NOT ENGAGE IN IMPROPER FACT-FINDING.

As set forth in Supreme Court Rule 10:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Sup. Ct. R. 10. Apparently regarding their case as one that falls into this "rare" category, petitioners argue that the First Circuit erred by ruling "as a matter of law [that] there was no evidence of indoctrination." (Petition, at 13). This ruling, petitioners complain, was "plain error" in that it runs afoul of the rules of notice pleading as permitted under Fed. R. Civ. P. 8.

Petitioners are mistaken. The First Circuit expressly cited petitioners' allegations that respondents are "systematically indoctrinating the Parkers' and the Wirthlins' young children contrary to the parents' religious beliefs and that the [respondents] held a 'specific intention to denigrate the [families'] sincere and deeply-held faith.'" (App. A10-A11). The

First Circuit then properly recognized that, on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), petitioners' factual allegations "must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true." (App. A13, citing *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955, 1965 (2007)). Petitioners do not dispute this as an accurate statement of the law.

The First Circuit then considered whether the allegations thus pled, if taken as true, were sufficient to raise petitioners' right to relief under the Free Exercise Clause of the United States Constitution. The Court concluded they were not. (App. A39). Specifically, the First Circuit focused on the need for petitioners to allege some form of governmental coercion – either a direct interference with their religious beliefs, or a compulsion in the form of a punishment for their religious beliefs. (App. A31-A35).

> The Free Exercise Clause, importantly, is not a general protection of religion or religious belief. It has a more limited reach of protecting the free exercise of religion. . . .. Specifically, "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion."

(App. A31-A32, quoting *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 223, 83 S.Ct. 1560 (1963)). Applying this standard to the Complaint, the First Circuit concluded that petitioners did not

allege sufficient coercion, either in the form of direct interference with their religious beliefs, or a denial of benefits. (App. A35).

Focusing specifically on petitioners' claims of "indoctrination," the First Circuit rejected petitioners' conclusory statements that "indoctrination" necessarily amounts to unconstitutional coercion. And, even assuming (without deciding) that "*extreme* indoctrination" can be a form of coercion, the Court found inadequate facts in petitioners' Complaint to support such a claim against respondents. (App. A36) (emphasis added).

The First Circuit did not engage in improper fact-finding. Rather, it viewed the facts pled by petitioners as insufficient to raise claims of a constitutional magnitude. The petition for a writ of certiorari should be denied.

## CONCLUSION

Petitioners have failed to satisfy the criteria for the issuance of a writ of certiorari to the United States Court of Appeals for the First Circuit. Respondents respectfully request that the Parkers' and Wirthlins' petition be denied.

Respectfully submitted,

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Dated: June 27, 2008